J A M A I C A

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEALS Nos. 44, 45, 48, 49, & 106/79

BEFORE: The Hon. Mr. Justice Zacca, President
The Hon. Mr. Justice Kerr, J.A.
The Hon. Mr. Justice Rowe, J.A.

R. v. LYNDEN CHAMPAGNIE
OSWALD CHISHOLM
RECARDO WELSH
ANTHONY GREEN
DELROY PALMER

Berthan Macaulay, Q.C., & Miss Kay Bennett
for Champagnie

Berthan Macaulay, Q.C., & Randolph Williams
for Chisholm

T. Ballantyne for Welsh

Dennis Daly for Green

Noel Edwards, Q.C. for Palmer

F.A. Smith & Lennox Campbell for Crown

May 18 - 22, 1981;
June 8 - 10, 1981;
& July 17, 1986

ROWE, P.:

At a trial lasting from January 29 to May 30, 1979, and covering many thousand pages of transcript, the five appellants herein were convicted of murder in the Home Circuit Court before Ross, J. and a jury. Champagnie, Chisholm and Palmer were each sentenced to suffer death

in the manner authorised by law, while Welsh and Green were ordered to be detained during Her Majesty's pleasure, as it appeared to the Court that they were both under the age of 18 years on the date of the murder for which they were convicted. The appeals came on for hearing in May and June of 1981, and at the end of the hearing we treated the applications for leave to appeal as the hearing of the appeals, and in the cases of Champagnie, Chisholm, Welsh and Palmer, we dismissed the appeals, whereas in the case of Green we allowed the appeal, quashed the conviction, set aside the verdict and entered a verdict of acquittal. We then promised to put our reasons in writing. Due, however, to the most unpardonable oversight, the records got filed away and the reasons for judgment were never prepared. We cannot after this lapse of time rely upon our memory of any impression formed during the hearing of the appeals and we will therefore confine our reasons to the points which clearly appear from our notes made during the hearing.

There are disgusting features connected with the murder of Cecil Martin on July 9, 1977, not paralleled in our experiences. Martin and his common-law wife Hyalyn Phipps had retired to bed in their two-room apartment at 35 Rosalie Avenue in St. Andrew on the night of July 8, 1977, at about 9 p.m. Miss Phipps was aroused at 3 a.m. to see human hands from outside attempting to move closed glass louvre windows into a horizontal position, that is to say, to open them. She awakened Cecil Martin who called out enquiring who were those disturbing his window and he received the reply:

> "Police, we have come to raid you ..... and we going to shot you too."

Immediately Phipps heard the report of a firearm explosion and she saw Martin fall from the bed on to the floor. Martin had been shot just beneath the inner edge of the left collar bone, the bullet passing through the chest wall, through the upper lobe of the left lung, the ascending portion of the large artery emerging from the heart through the back of the chest wall where it exited. The left side of his chest was filled with fluid blood and his death was due to shock and haemorrhage associated with the gun shot wound.

Miss Phipps hid herself under her bed. The door to the house was kicked open and five men entered the house. Electric lights were switched on, Miss Phipps was discovered and ordered from her hiding place. A demand for money was made upon her and she pointed to the trunk of the bed from which one of the men stole two parcels of money. A T.V. set was removed and then two of the men took Miss Phipps outside and raped her. Quite repulsive conduct one might think, but that is just what Miss Phipps said occurred at her house that night.

Police investigations led to the recovery of the stolen T.V. by Detective Corporal Thompson from one Leroy Thomas at premises 12 St. Paul's Avenue on July 10, [illegible] days after the murder. Leroy Thomas was taken to the Hunts Bay Police Station and in the presence of the appellants Champagnie, Chisholm and Welsh, Thomas gave an account of how he came into possession of the T.V. set. This explanation according to the police was to this effect.

> "A dem three man ya come a mi room the other morning and ask me fi put up the T.V."

Whereupon Champagnie is said to have responded:

> "A Fowlie kill the man, a no me sah."

Now, Det. Corporal Thompson said that the appellant Chisholm was otherwise called "Fowlie," that Champagnie was otherwise called "Steve" and that Welsh was otherwise called "Recardo", and consequently this reference to "Fowlie" was understood by the Corporal to be a reference to the appellant Chisholm. We must say at once that the learned trial judge correctly directed the jury that this accusation by Champagnie was not evidence that could ever be taken into consideration against the appellant Chisholm. Its only worth and value in the case was that if the Detective Corporal was believed on this point, the statement by Champagnie was capable of showing that Champagnie was present at the murder scene in respect of the charge.

Officer Thompson said that after Thomas and Champagnie had spoken he cautioned the three appellants Champagnie, Chisholm and Welsh and each said he wanted to give a statement.

The prosecution's case rested on these plinths. Miss Phipps identified the appellants Champagnie, Welsh, Chisholm and Palmer at separate identification parades. As against Champagnie there was in addition the initial statement on July 10 in the presence of the man Leroy Thomas and after arrest and caution:

"Mi never kill no one."

As against Chisholm, there was a caution statement and his response after arrest and caution:

"Me never want fe do him nothing."

Welsh is alleged to have said after arrest and caution:

"Mi never have no gun."

Palmer is alleged to have said in similar circumstances:

"A company mi ah follow",

and he gave a caution statement. Green was not identified on the parade by Miss Phipps. After caution he is alleged to have said:

"Mi never kill no one",

and he too is alleged to have given a voluntary statement after caution. This statement of the Crown's case shows that although it was alleged that Champagnie and Welsh had voluntered to give statements, those statements were never admitted in evidence.

Each appellant put forward the defence of alibi contending that on the night of the murder they were not at Martin's premises on Rosalie Avenue, and denied the statements attributed to them by the police. Welsh gave evidence on oath. He said that on July 9, 1971, he was in St.Ann at the home of his mother, and she corroborated him on this point adding that they slept in the same bed. He told of his arrest by the police and described how the police showed his face to Miss Phipps while he was in the cells on the day when the parade was to be held. He said further that when the parade was drawn up a policeman left the room and therefore had opportunity to communicate to the waiting witnesses not only what he was wearing but his position in the line. He testified that additional assistance was given to Miss Phipps to identify him in that police officer Francis sat almost directly opposite to him as he had moved from his earlier position in the line and when Miss Phipps was walking the line, officer Francis stamped his foot thereby attracting Miss Phipps' attention and that even then the most that she did was to point in his general direction.

The person actually identified, said he, was the man in No.5 position whereas he was standing at position No. 4.

An attorney-at-law, Mrs. M. Macaulay was on the parade watching its conduct on behalf of the appellant Welsh and she actually gave evidence at the trial. Her evidence did not support Welsh in this level of perfidious irregularity on the part of the police and Miss Phipps. Welsh gave evidence favourable to the other appellants as corroborating their allegations that the police used extreme force to extract statements from them. The prosecution gladly received evidence from Welsh that he knew the appellant Palmer very well for a long period of time.

Champagnie gave evidence on oath. He said he was at his mother's home on the night of the murder and took no part in those events. His identification by Miss Phipps, he said, was contrived by the police in that office. Moore took him to the C.I.D. office on the morning of the parade, brought him into the presence of Miss Phipps, asked him to show his teeth and drew Miss Phipps' attention to the condition of his teeth. Then on the parade Miss Phipps asked all the men to speak, later she asked them all to show their teeth and only after he had so done, was he identified. Mr. Moore and Miss Phipps denied the encounter with the appellant Champagnie in the C.I.D. office. On the parade, Champagnie was represented by Mrs. Macaulay, attorney-at-law and she gave evidence saying that as Miss Phipps was walking up towards No. 1 on the last occasion she saw Sergeant Brown who had his left hand by his side, hold that hand with his right hand across his back, that Miss Phipps looked at Sergeant Brown and pointed to Champagnie at No. 5. Mrs. Macaulay said she inferred that there was something significant in the gesture and so she made a complaint to Sergeant Thomas. Sgt. Brown could not recall holding his hands in this position and

Miss Phipps said she did not notice any such gesture and was not assisted thereby. Much as we would wish to credit our police sub-officers with great subtlety in their investigations, we think that the jury had every reason to pay no attention whatever to the complaint contained in Mrs. Macaulay's evidence on the ground that the suggested manoeuvre was too clever by half. Two other witnesses called by Champagnie in support of his defence testified in the one case of acts of cruelty perpetrated by the police in respect of several of the appellants and upon the man Leroy Thomas and in the other case that Champagnie was at home on the night of the murder. One witness was in custody awaiting trial on a charge of murder and the other was the mother of Champagnie.

The appellant Palmer in his unsworn statement said he was at his home on the night of July 8. He was taken into custody on July 10 and detained at the Hunts Bay Police Station. He described how some police officers threw him across a table in the C.I.D. office and beat him with a bottle all over his back. He fell to the floor and was thumped in the abdomen and in his face; he was hit with a big book in his chest and head. He protested that he was not following any bad company. From there he was taken to an office and shown some sheets of paper with writing which he was told to sign, "otherwise him going to kill me r.....". Because he was "coward and afraid" having regard to the earlier beating he complied by signing his name. The contents of the statement produced in evidence, he said, were untrue and in fact were not ever assented to by him. In reference to the identification parade, he said that it was after Miss Phipps had walked the line four times that she asked for the men to open their shirts, and lift their vests and when he complied scars in his chest which he had received in an incident when he was robbed of his motor cycle and injured, were exposed. Then it was that she

pointed him out. Miss Phipps had said that when one of the men was in the act of raping her his shirt was open and she saw scars in his chest. At trial she maintained that she had recognized Palmer by face which recognition she confirmed by the presence of the tell-tale scars.

Palmer complained about the fairness of the parade, asserting that two volunteers who had previously been used on a parade for Welsh were also used on his parade and he was placed between these two men so as to be easily identifiable. The weakness with this contention is that Palmer was free to select any place in the line-up that he fancied.

The appellant Chisholm made an unsworn statement. His alibi defence was that he was suffering from dengue fever and for the week preceding July 10 he had not left his home. He was on his bed on July 10 when the police arrived and took him off to the police station where he was put to join a number of other young men. On being asked if he knew anything about the murder, he denied such knowledge. That led to his being placed on the "cutting table" where he was beaten across his back, his buttocks and his side. One policeman used a stone hammer to hit him across his back. Then he was put to sit on the floor while the police gave similar beatings to one "Fat Dread" and the appellant Champagnie. He was put back on the table and beaten across his back, on the sole of his feet and on his ankle. Lastly someone used a pick-axe stick to hit him on his toe. Chisholm said that it was after all this ill-treatment that he was asked to sign a paper on which there was writing and he did so in order to avoid further beating. He denied telling Det. Corporal Thompson that "me never want fe do him nothing". He said too that the police allowed the prosecution witness Miss Phipps to view him prior to the parade.

The defence of the appellant Green consisted of his unsworn statement from the dock and his attack upon the case for the prosecution. He gave a long account of numerous acts of assault committed upon his person by the police officers at Hunts Bay, very much in line with the account earlier recited of the appellant Chisholm. He said he signed a paper produced by the police only after he had been ordered to place his "private" on a table and had been struck a blow thereon. He reminded the court that Miss Phipps not only failed to identify him on the parade, but identified someone else, and the defence therefore submitted that the dock identification of Green by Miss Phipps was unreliable and ought to be rejected.

Mr. Ballantyne complained on appeal that the learned trial judge unfairly commented on the fact that the appellant Welsh did not give any evidence of having been beaten by the police in order to make a statement and that these comments had the effect of encouraging the jury to find that Welsh was not a witness of truth. The learned trial judge had ruled the statement allegedly taken from Welsh as inadmissible. However, defence counsel appearing for Welsh made submissions to the jury that the police had used violence to extract the statement from Welsh. Up to that time there was no evidence before the jury as to any statement made by Welsh apart from what he is alleged to have said after caution and therefore the trial judge had a duty to tell the jury that Welsh had not said to them either in examination-in-chief or cross-examination that he had been beaten by the police. His comments were apposite having regard to defence counsel's submissions and there is no merit in the complaint.

A second ground of appeal argued by Mr. Bellantyne was to the effect that references to the appellant Welsh in statements made by other appellants ought to have been edited so that the jury would not have become aware of those references. This is plainly an untenable proposition because it is always open to one co-accused to implicate another when putting forward his defence or if not to implicate, certainly to show why it was that that co-accused acted in the way he did. The duty which lay upon the trial judge was to give clear and unequivocal directions that what one co-accused said in relation to another person charged, unless it is said from the witness box, cannot be evidence against that co-accused and can only be evidence against the maker of the statement and there was no complaint that the learned trial judge had not discharged this duty. We found no merit in the ground argued on behalf of the appellant Welsh.

Mr. Edwards did not detain us long in his submissions in relation to the appellant Palmer. In our view he rightly conceded that the learned trial judge dealt with the matter of identification so exhaustively and so carefully that one had the impression that he was treating visual identification as if it were the only evidence against Palmer. The trial judge's directions were full and fair and we found no merit in the ground of appeal put forward on behalf of Palmer.

Several grounds of appeal were argued in respect of the appellant Chisholm. It was submitted that having admitted the statement allegedly made by Chisholm as a voluntary statement, the learned trial judge gave directions to the jury which would indicate that it was for the jury to determine whether the statement was free and voluntary and on that basis to assign weight and in doing so the trial judge failed to give sufficient attention to whether the statement amounted to an

admission which was true and reliable and could be acted upon.

Miss Phipps had identified Chisholm at an identification parade and the real purpose of putting the statement of Chisholm into evidence was to support Phipps' testimony that Chisholm was present at her home in the company of the person who shot the deceased. If the presence of Chisholm was not established then the structures of the case against him would surely fall. It was therefore right for the trial judge to spend time instructing the jury on how to weigh the evidence contained in the caution statement. He did this several times and the following extract from pages 1816-17 of the record is but one example of those directions:

> "In considering the question whether it is the statement of the particular accused, as reasonable and intelligent men you will take into account the contents of the statement, what is in it, the things said in it as well as the evidence about the circumstances in which this statement was taken, as given by the Prosecution and the Defence, because the Prosecution, you will recall are suggesting to you that this was a voluntary statement given by the accused. The Defence is saying 'nothing like that, we know nothing at all about the statement, we were forced to sign'. It is being suggested that this is something which the police concocted. So you examine the actual things that were said in it and ask yourselves, does it sound like something which the police concocted, and I suppose you may think, it is a matter for you, if they had some information and quite a bit of imagination, they could sit down and concoct a story such as is set out in each of these statements; but does anyone of these statements sound like a concocted story? It is a matter for you.
>
> If you are satisfied that the statements were made by the particular accused, then you go on to consider whether or not you are satisfied that the statement was free and voluntary. If you find that the statement was made by accused, that there was some inducement to make it, there was some threat, some promise, some force used as the accused have told you and as a consequence of that

> "they made the statements, then, of course, you may think that you could not really rely on the contents of those statements, they carry very little weight. A man under torture, under beating, may well say anything at all."

One of the grounds argued by Mr. Macaulay on behalf of Chisholm complained that the learned trial judge in deciding the question of admissibility of the applicant Chisholm's statement took into account an irrelevant matter, i.e. the omission of another applicant to give evidence corroborating Chisholm's evidence. He submitted that where there is a trial of several accused and each of them take an objection to a statement it is the duty of the trial judge to hear the evidence in relation to each objection and to rule on each one successively. In such a case, he said, the judge cannot determine the objection on any one of them on the basis of evidence which he heard earlier on the voire dire of others of the accused. This would seem to be a sensible and workable proposition and one which would be followed in most cases. A situation developed in the trial of these appellants brought about by the direct requests of counsel for the defence and in the face of grave misgivings on the part of the trial judge. Mr. Macaulay, at p. 522 of the record advised the trial judge that all counsel in the case had earlier agreed that in order to save time all the voire dires should be done together and that it seemed that counsel for the Crown was not then still attracted to that method of procedure. Mr. Daly following on sought to persuade the trial judge towards a joint voire dire when he said at p. 523 of the record:

> "M'Lord, the application to have all the voir dires taken together is based not simply on convenience as it obviously would be convenient not to have the jury coming in and out as it is intended by all five accused to hold voir dires but it would also be the issue, well, and issue affecting the justice of the matter in that there is a clear inter-relatedness between all the voir dires, as your lordship would have gathered

> "from the cross-examination of Mr. Thompson. It would have been impossible really for each accused to have cross-examined without in fact affecting the others because of the time factor at which the statements are alleged to have been made and because they are all so inter-related in time and all having taken place at the same place and it would, therefore, be a matter of convenience since the evidence of one witness is likely to impinge and affect the evidence of others in other voir dires. That is the main source of the application that it would be convenient to have just one voir dire and have all the witnesses dealt with rather than have five separate ones which not only make it difficult for the representatives of each accused to relate to it but also it would take longer."

And for the next seven pages of the record, Mr. Macaulay, Mr. St. Bernard and Mr. Daly, implored the judge, with a variety of reasons to rule on a joint voire dire. In the end the judge said he would not fetter the prosecution if crown counsel wished to have separate voire dires. When in such circumstances a joint voire dire is held, and the trial judge relies on all the evidence available to him and the inferences to be drawn therefrom to arrive at his conclusions, it lies not in the mouth of defence counsel to say that he acted improperly. This ground of appeal fails.

It was agreed too, that the evidence relating to burglary and robbery with aggravation of the money and the T.V. was inadmissible as these acts occurred after the shooting and as such had no probative value and furthermore was highly prejudicial as tending to show that the appellants had been guilty of other offences. Suffice it to say that we are of the view that the shooting, the burglary and the robbery constituted a single activity and the evidence of the breaking down of the door, the taking of the money etc. was explanatory of the purpose of the raid upon the premises. There was no merit whatever in this ground of appeal.

Both Miss Bennett and Mr. Macaulay made submissions on behalf of the appellant Champagnie. Miss Bennett agreed that the identification evidence of Phipps in respect of Champagnie was suspect and unreliable because Phipps did not in the description which she gave to the police make reference to anyone having missing teeth and yet this was either wholly or partially the basis upon which the identification was made. She referred too, to the fact that the learned trial judge omitted to give any specific direction to the jury that the description given to the police did not include "missing teeth". Phipps said in evidence that she had recognized Champagnie before she asked for the men to show their teeth.

Counsel for the Crown drew the Court's attention to several passages in the summing-up where the trial judge gave full general directions on visual identification and in enumerating the factors which a jury must bear in mind, the judge referred to the factor of description. We were not persuaded that in the overall, the summing-up in relation to the appellant Champagnie was unfair or inadequate.

We treated the hearing of the application for leave to appeal by Green as the hearing of the appeal and we allowed the appeal on two main bases. The dock identification was unsatisfactory in that Phipps had failed to point out Green on the identification parade and she gave no satisfactory explanation for that failure. Secondly, the inconsistencies and discrepancies in the police evidence as to the time at which, the place where and the circumstances under which the statement from Green was taken were not resolved by the trial judge. The evidence for the Crown was in disarray with some police officers denying that the appellant Green was in the room where other police witnesses said he was when he is alleged to have given the statement. As this statement was

the sole evidence implicating the appellant Green, and as the circumstances under which it was given were so very much in doubt, we were of the view that the trial judge erred in holding that a prima facie case had been made out against Green. We need say nothing about the strictures which Mr. Daly urged against the summing-up as in our view the case ought not to have gone to the jury.

As we said earlier, these are the reasons which caused us to treat the hearing of the applications in respect of Welsh, Palmer, Chisholm and Champagnie as the hearing of the appeals which were in due course dismissed.