JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL No. 86/85

BEFORE: The Hon. Mr. Justice Rowe, President
The Hon. Mr. Justice Carey, J.A.
The Hon. Mr. Justice White, J.A.

R. v. CLIVE MULLINGS

Anthony Pearson for appellant

Mrs. M. Smith for Crown

May 8 and 21, 1986

ROWE, P.:

Five prisoners were locked in a dark cell in the Old Harbour Police Station on the night of May 31, 1984. They included the appellant, one Alfred Reid and the deceased Lester Ingram. Ingram had been arrested for improper conduct in a spirit licensed premises earlier that night and it can be inferred from the evidence that he was in a state of partial intoxication when he was placed in the cell. Next morning Ingram was found to be dead. Two weeks later the post-mortem examination of his body disclosed:

(a) a contusion on the temporal region 4 inches by 3 inches,

(b) a contusion below the left eye 2 inches by 2 inches,

(c) a contusion below the right nipple 2 inches by 1 inch,

(d) multiple small abrasions at the front of both knees.

On dissection the scalp was found to be contused in the frontal and parietal areas and there was subdural haemorrhage to the base of the cerebellum. The pathologist said that death was due to shock and haemorrhage, "that is bleeding as a result of injuries to the chest". A blunt force e.g. a baton or a fist, he said, could have caused the injuries.

Two of the inmates in the cell were put on trial before McKain J. and a jury in the St. Catherine Circuit Court for the murder of Ingram. Insufficient admissible evidence was tendered by the Crown in respect of the co-accused Reid, and the judge, quite properly, directed the jury to return a verdict of not guilty against him. The jury obliged.

The case for the appellant was left to the jury in a most puzzling and unhelpful manner. The issues of accident, provocation and self-defence were expressly withdrawn from the consideration of the jury on the bases that those issues did not fairly arise in the evidence. However, the learned trial judge invited the jury to return a verdict of not guilty in these circumstances:

> "So, how you look at it, Mr. Foreman and members of the Jury, you look on the prosecution's case, has the prosecution made out a case to your satisfaction. Then, you look on what Mullings has told you, is his story true; did the circumstances point to what he says or when you look on it, has the prosecution satisfied you, based on what he, himself, has told you. If what Mr. Mullings has told you has satisfied you, then you must bring him in not guilty. If what he has told you raise grave doubts in your minds, then you must bring him in not guilty."

If this passage means that it was open to the jury to find that it was not the acts of the appellant which caused the death of Ingram, it is so couched that they might have missed the point completely. If it means that they must

consider whether the cautioned statement which was tendered in evidence was obtained in circumstances which derogated from its probative value, the quoted passage is not sufficiently explicit. One thing, however, is clear, and that is, the jury were invited in no uncertain terms to return a verdict of manslaughter on the ground that the appellant had no intention to kill the deceased or to do him grievous bodily harm. Against the verdict of manslaughter and the sentence of seven years imprisonment at hard labour, Mr. Pearson advanced five grounds of appeal, all of which were found to be meritorious and, at the conclusion of the hearing of the appeal, we allowed the appeal, quashed the conviction, set aside the sentence and recorded a judgment and verdict of acquittal. These are our short reasons for that decision.

Evidence was led before the jury that during the night of May 31, a police officer on cell duty over-heard sounds emanating from cell No. 3 which prompted him to enquire if anything was wrong therein. Response came from the appellant who assured the constable that everything was all right. Cons. Wright opened the cell on June 1. Three men came out. The appellant and the deceased were seen lying down. An order was given to the appellant to come outside and to wake the other man. He replied, "Boss,the man not wake." Special Constable Gillespie entered the cell and found the deceased lying on his face, his hands tied behind his back, his pants down, his face swollen and he was bleeding either from his mouth or his nose. Constable Wright addressed the prisoner Reid saying,

"What happened to the man?" Reid replied, "Ah Massop kill him." The appellant who is called Massop is alleged to have said, "A nuh me one beat him." Both Reid and the appellant were arrested for murder. Later that day a statement was signed by the appellant and it formed the real basis for the prosecution's case.

In that statement the appellant said:

> "Me, Alfred Reid, Livingston Walton and Lorenzo Jackson was lock up in the Number three cell at Old Harbour Police Station. I go in the cell from May 11, and that time Walton was in there already. Jackson and Reid come after.
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> Thursday night, May the 31st about nine o'clock, the police put a man into my cell. Him tell mi that him name was Ingram. Him did look drunk to mi and was making a whole lot of noise. Him continue with the noise until about nine-thirty when Reid call to him and tell him to stop for we couldn't sleep. When Reid talk to him him start beat him chest and say, 'A no none gal pickney di police carry come in yah, him a big man and no man can't do him nothing in yah.'
>
> Mi get up and hold him in him chest and sey, 'Daddy, you fe behave yourself for you come yah come see wi and you can get lick for we want sleep.' Reid get up and sey, 'A play you ah play wid di man.' So, him start to lick him in him chest. Him drop on Walton, then lay down on his back wid his hand on his chest as if him was sleeping. Mi tell Reid sey him nuh fe bother lick him again for it look like him drunk.
>
> Di whole ah wi lay down and mi doze off and mi feel somebody ah choke mi and when mi jump up and look mi see sey ah Ingram. A use mi foot and kick him off mi to release di grip from round mi neck. Mi get vex and mi tek mi fist and start fe beat him in his mouth and face and him start bleed through his mouth and nose. Ah mek him lay down on him face and ah tek off him trousers and tie him hand behind him.
>
> About half past ten the police come and ask what happen and ah tell him sey di man try fe tek mi life when mi did ah sleep and ah mi did ah lick him. The police left. Him beg me fe loose him hand but ah tell him dat ah not doing it, for when him hand did free him try fe kill me.

> "All ah we lay down again and ah fall asleep. I wake up about three o'clock in the morning and hear him ah mek noise and ah notice dat him hand dem did loose. I ask him who loose him and him sey, God. I ask Walton if is him loose him and him said no. Walton tek back the pants from him and tie up back his hands behind him. He put him on his back and kneel down in his belly and den beat him badly with his fists in his chest, face and neck. Him beat him till him vomit. Him beg Walton to stop beat him but him wouldn't stop. I tell him to stop lick di man and him stop.
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> I go back go sleep and wake up about six-thirty and ah see di man on him belly wid him hands still tie behind him. Ah tell Walton to loose him and him loose him. Ah never see him move but I believe him was sleeping.
>
> When di police come and open di cell di man did not get up, so, dem chuck him and find out sey him dead. Mi nuh know nothing more. That is all. "

Supplemental ground 5 complained that the Crown failed to establish that any act of the appellant caused or contributed to the death of the deceased. At one point in the summing-up the learned trial judge introduced the issue of common design as part of her overall treatment on the issue of intention. The matter was left inconclusively thus:

> "If, also you find, that two people fighting or anybody give a person a beating, you give too (sic) and me give too (sic), if I alone beat him to death then you must say there is an intention because 'you don't stop' but if everybody come and give a 'lick' ..... if you find that the person, that the accused person whose case you are judging did not have it in his mind at that particular time to commit murder, that is to say, did not intend the result, ... then you would say that he is not guilty of murder but he would be guilty of manslaughter, based on your findings."

Was there evidence that the appellant was either part of a common plan to beat the deceased or that he joined with others in the assault? If there was a plan, then it is conceivable that individual actors could all be responsible for the result. Clearly if the deceased was being

systematically beaten in relays, first by one, then by another, and so on, until he succumbed to the blows, all the individual actors could be said to be part of a master plan to kill or cause grievous bodily harm and so be guilty of murder or manslaughter having regard to the circumstances. But was such a direction justifiable in the instant case? The appellant's statement referred to five separate incidents on the night. Firstly, the deceased noisily disturbing his cell-mates against their protests, and the appellant's warning that this could lead to violence; secondly, the intervention of Reid, who, unhappy with the appellant's peaceful overture, said "A play you a play with di man" and Reid delivered the first blows to the chest of the deceased. The appellant's report that "him drop on Walton" suggests that Reid and the deceased began to wrestle with the deceased getting the better of the struggle until the deceased laid down in a sleeping position. According to the appellant, he continued to be sympathetic towards the deceased, by advising Reid to desist as in the appellant's view the deceased appeared intoxicated.

The third incident related by the appellant is of utmost significance as this is where he talked of what the deceased did and his response. While the appellant was asleep, the deceased attacked him and on waking he discovered that the deceased was holding him, the appellant, around his neck and in the words of the appellant: "di man try to tek mi life." Those were the circumstances in which the appellant said that he kicked and thumped the deceased so that he started to bleed through his mouth and nose.

Some 4½ hours later the fourth incident occurred. In the statement it is recorded that the appellant said he woke up to hear the deceased making noise and to see that his hands which had earlier been tied behind his back were

loosened. It was Reid, said the appellant, who re-tied the hands of the deceased behind him and proceeded to beat him in a particularly vicious manner. "He put him on his back and kneel down in his belly and den him beat him badly with his fists in his chest, face and neck. Him beat him till him vomit. Him beg Walton to stop beat him but him wouldn't stop. I tell him to stop lick the man and him stop."

The final event was the morning awakening and the realization that the deceased had died.

In our view, the learned trial judge had a duty to relate the acts of the appellant to the findings of the pathologist to determine whether there was any nexus between his acts and the cause of death. The pathologist was not asked whether blows to the head and face as described by the appellant in the statement was a contributory cause to the death of the deceased. On the face of that statement, all the fatal injuries could have been caused in the attack upon the deceased by Reid at about 3 a.m. The learned trial judge in the summing-up, inexplicably, gave no direction to the jury on this possibility which fairly arose from the statement and her earlier reference to common design might have led the jury to believe that once the appellant had beaten the deceased, he was actively responsible for the death. Crown counsel conceded that the failure to show the nexus between the alleged actus reus and the cause of death was fatal to the conviction.

Mr. Pearson complained that the learned trial judge failed to direct the jury on how to treat the statement made by the co-accused Reid implicating the appellant. It is to

be recalled that Reid had said to Constable Wright in the presence and hearing of the appellant "Ah Massop kill him", to which the appellant had replied, "A nuh me one beat him." Reid did not repeat the accusation in evidence. In relation to this statement the learned trial judge directed the jury that:

> "So, you look, if you feel you have to be very suspicious of what Reid said Massop did."

Reid's accusation could not by itself be evidence against the appellant. Probative value, in these circumstances arises from the reaction of the appellant, if any, to the accusation. Donald Parkes v. R. [1976] 14 J.L.R. 260. By inviting the jury to be very suspicious of Reid's accusation, the learned trial judge was treating the accusation per se as admissible evidence, which could be weighed in the totality of the evidence against the appellant. This approach was wrong.

The complaint in ground two, was that the learned trial judge failed to properly direct the jury on how to treat the cautioned statement. There was evidence from the appellant that he had been beaten by police officers early in the morning of June 1, 1984, that in the afternoon he was asked to sign an already prepared statement but he refused on the ground that he knew nothing about it, that he was taken away and given more blows and finally that he was brought into the presence of a sergeant who threatened him and called for a baton. The softening up process, said the appellant, also included a statement by a special constable, reminding the appellant that, "remember one time I shoot you." These were the events which the appellant said induced him to sign the statement.

At page 31 of the record, the learned trial judge reminded the jury that the appellant was saying that the police had malice against him and that that accounted for the fabricated statement, and then directed the jury that:

> "The malice has to come from the person who caused it to be given and he said it was some other man had said so and that man had malice. But what malice did he show you that Mr. Reynolds and Mr. Grant had? So that is how you will have to examine it."

Clearly the learned trial judge could not have been saying that if one person in authority offers an inducement to a person to make a statement, and a statement is taken down by some other person, the question of the state of mind of the person who gives the statement is irrelevant. If that were the law, all the safeguards in relation to the exclusion of involuntary statements could be circumvented with childish ease.

Another unsatisfactory feature of the summing-up was the learned trial judge's treatment of the burden and standard of proof. At page 7 of the record the jury were directed that:

> "Normally, an accused person sits in the box innocent until you by your verdict should say otherwise."

What does the adverb "normally" mean in this context and should the jury consider this to be a normal or an abnormal case? The appellant and his co-accused had given sworn evidence. The jury were told that their sworn evidence "is as strong as the prosecution's evidence". Criticism was levelled at the use of the word "strong" as in the context, the jury could well have thought that the

prosecution had presented a strong case against the appellant. This rather loose way of conveying the thought that evidence for the defence should be given the same impartial weight as evidence for the prosecution / provides unnecessary room for argument on appeal.

Ground one complained that the summing-up was confusing throughout. We regret to say that the jury were not given any proper assistance on any of the important issues in the case, and consequently could not have arrived at a true verdict. We think too, that based on the cautioned statement, the defences of provocation and self-defence ought to have been left to the jury. The general insufficiency of the evidence together with the defects in the summing-up compelled us to allow the appeal and enter a judgment and verdict of acquittal.