JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS: 216, 217 & 218/88

COR: THE HON. MR. JUSTICE CAREY - P. (AG.)
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE GORDON, J.A. (AG.)

R. v. DELFORD GARDNER
CEVAS MURRAY
ALBERT CLARKE

Miss Helen Birch for Gardner

Dennis Daley Q.C. & Mrs. Pamella Gayle for Murray

Delroy Chuck for Clarke

Lloyd Hibbert for Crown

8th & 15th April 1991

GORDON, J.A. (AG.)

On 10th November 1988 the applicants were convicted of murder at the end of a four day trial in the Hanover Circuit Court.

The deceased Mr. Adrian Alexander Aird died from gunshot injuries inflicted by persons who invaded his home at Content in Hanover at about 4 o'clock on the morning of 3rd December 1987. Mr. Aird was awakened from sleep by the sound of intruders in his home. Accompanied by his 10 year old ward Desmond White, he went to investigate and he was shot at close range. Wellesley Kerr and Lloyd Buckridge who were sleeping in another section of the four bedroom house heard gunshots and went to see what was happening and were confronted by two men, one armed with a gun. At that time the body of Mr. Aird lay on the ground in a pool of blood. Both men were ordered to

lie down. Mr. Kerr lay prostrate beside the body (in the blood) while Mr. Buckridge lay on the bed. Mr. Kerr heard the men speaking, asking for money and saying they were gunmen. In the meantime Mr. Aird's ward who had joined them made good his escape. Prior to that, Mr. Kerr once attempted to raise his head to look around and the men threatened to shoot it off. He heard a voice in the building shout "yeow" and there was an answering "yeow" from outside the building. The intruders left shortly thereafter. There were no lights on inside the house, but the eave lights were on.

Kerrol Chambers, a nephew of the deceased slept at the home that night in a room to the front verandah. He was awakened by the sound of footsteps outside and on looking through the blades of a louvre window he saw the applicant Gardner whom he had known for over 20 years standing by the grill on the verandah. He observed, by the electric light which was on the verandah, the features of this applicant for 2-3 minutes. The applicant he said had a gun in his hand and he moved towards the side of the house and disappeared going to the back. Thereafter he heard the sound of glass shattering and indications of burglary. He also heard gunshots, and he hid himself under the bed in his room. When the men left he ventured forth and found the body of his uncle.

Desmond White a 10 year old schoolboy and the ward of Mr. Aird was in bed asleep with Mr. Aird when he was awakened. He heard a window smash and then two men entered whom he identified as the applicants Murray and Clarke. The latter was his brother. When the men entered Mr. Aird who was hiding behind the door, he said, was shot in the chest by Murray and fell. He himself also was hiding behind the door when Mr. Kerr and Mr. Buckridge entered the room and were ordered to lie down. One lay on the bed, the other beside the

deceased. He then heard one of the gunmen telling one of the men "if you get up him blow off you head." This he said was said by Murray. The witness ran from the building to his father's home.

The applicants Murray and Clarke each gave a cautioned statement to the police. These statements were admitted as part of the prosecution's case after a voir dire. Murray, in his statement admitted going along with others to the home, intent on killing the man, and taking his gun. When they arrived at the premises, he said he remained outside, while the others entered the home. He heard two shots discharged in the house. Thereafter he was rejoined by the others, one of whom admitted he had shot the man. This statement of Murray was given to Sgt. Morris on 22nd January 1988 after he had been in custody 3 or 4 days.

The applicant Clarke on the following day 23rd January 1988, gave a statement under caution to Det. Sgt. Morris in which he admitted that he and others set out for Mr. Aird's home to kill him and to take his gun and money. He undid the window, entered the house and opened a door for his co-conspirator. They began searching in the course of which Mr. Aird came upon them and was shot. They then left the house and he was given $40.00.

The prosecution's case was thus based on the evidence of the witnesses Kerrol Chambers and Desmond White as to identification of the applicants and that of the police officers as to statements made by the applicants and admissions/ confessions reduced to writing.

In their defence each applicant denied involvement in the crime. Gardner who gave evidence on oath, admitting he was at school with Chambers declared he was not at Aird's

premises that night and was not involved in the murder of Mr. Aird. His defence was an alibi. He said Murray and Clarke were his cousins. He admitted that while in custody he saw Murray and Clarke but denied they accused him in presence of the police, or at all, of involvement in the crime.

Albert Clarke in his statement said, he knew nothing of the incident of the 3rd December 1987. He was taken from his cell, beaten and told to sign a note and be sent home. He signed because he was feeling pain.

The applicant Murray in a statement from the dock said he was at his grandmother's house on 18th January 1988 when he was held by the police. He was questioned, beaten and taken to Clarke's house. Clarke was taken therefrom and beaten with a machete. Both were taken to the Police Station. On the 22nd he was taken to the guard room and questioned. He said he knew nothing about the murder. Later that day he was given a blank sheet of paper and told to sign it and he would be sent home. On this inducement, he signed the paper.

The learned trial judge directed the jury on the dangers inherent in visual identification and specifically advised them to disabuse their minds of the evidence of Desmond White's purported identification of John Murray based on a description of his arms and stature. He also directed them to reject as worthless the evidence of Zachariah Barrett called by the prosecution. Barrett admitted that his statement to the Police and his deposition before the Resident Magistrate were concocted untruths. The jury had to consider the evidence of Kerrol Chambers and Desmond White on their purported identification of Gardner and Clarke respectively and the evidence of the police officers of statements made by the applicants and the confessions of Murray and Clarke.

Miss Birch with refreshing candour informed us that after a very careful perusal of the record she found no meritorious ground to argue on behalf of the applicant Gardner. With this statement we are in entire agreement. The learned trial judge after giving correct and lucid directions in law went on to isolate the evidence against each applicant and dealt fairly with the case of the prosecution and the defence leaving the issues for the jury's determination.

Mr. Daley on behalf of the applicant Murray obtained leave to argue three grounds of appeal. Ground 1 was the first ground argued it reads:

> "1. (a) That the prosecution failed to discharge its burden of proving that the alleged 'Caution Statement' by the applicant was made freely and voluntarily 'without fear of prejudice or hope of advantage,' and accordingly the Learned Trial Judge erred in admitting the said Caution Statement in evidence.
>
> (b) That having admitted the said Caution Statement the Learned Trial Judge's directions to the jury that he had decided it was free and voluntary (P. 207) in the absence of a very careful direction that they were not to be influenced by his finding in deciding this question for themselves, was prejudicial to the defence."

Mr. Daley urged that in the light of the fact that when he was taken into custody by Det. Cpl. Smalling on 19th January 1988, applicant Murray in response to questions gave an alibi, his subsequent confession to Sgt. Morris on the 22nd January 1988 was improbable and implausible and the learned trial judge should have exercised his discretion in favour of the applicant and refuse to admit the cautioned statement.

Sgt. Morris spoke of the circumstances in which the confession came to be given. He said that acting on information given to him he went to Leader Avenue, Montego Bay and spoke to the mother of this applicant. He then went to Sandy Bay Police Station where the applicant was detained and spoke to him. He said "I told him that I have interviewed his mother and Devon Clarke pertaining to his presence at Leader Avenue on the night of the 2nd December 1987 and that I was told that he was not there". To this the applicant replied "mek me tell you the truth, a nuh me kill the man". He was thereupon cautioned and he thereafter gave the statement admitted by the Crown.

A ruling on the admissibility of a confession statement is a ruling in law and not a finding of fact. The learned trial judge has to consider the question of the voluntariness of the alleged confession statement and in this case the Judge's ruling at page 104 of the transcript reads:

> "At the time that the objections were taken on the admission of these two statements, counsel for the second and third accused informed me that the grounds for his objection in each case was that the accused men signed blank sheets of paper, but they did not dictate the body of the statement. Both accused men have given evidence on oath and they were shown these statements, and each has now said that the signatures appearing thereon in each case is not theirs and so if they did sign the paper, it is not that one. In other words, each one is saying that the statement which the crown proposes to put in evidence, each statement is a forgery. In those circumstances it does not fall on this court to decide on the admissibility of the statements.
> They will be admitted. Even so, on the evidence that I have heard from the three witnesses, Det. Sgt. Morris,
> Det. Corporal Smalling, I am satisfied that in each case the statements were dictated by the accused men in the circumstances narrated by the officers and that the statements were given voluntarily, and no sort of inducement was held out to them. The statement will be admitted in evidence, both statements are admissible."

The learned trial judge had considered the principles enunciated by Lord Bridge in **Adjodha v. The State** (1981) 2 All E.R. 193 and in the first segment of his ruling viewed the objection of the defence to the admissibility of the statement on the basis that each statement was a forgery. In this event the fourth situation indicated by **Lord Bridge** at page 202 (b) applies, viz - that no voir dire is called for. It would then be an issue of fact for the resolution of the jury. But this position did not become clear until all the evidence on the voir dire was in. Perhaps out of an abundance of caution, however, the judge went on to make a ruling in law on the admissibility of the statements and admitted them.

The fourth typical situation referred to by **Lord Bridge** reads:

> "4. On the face of the evidence tendered or proposed to be tendered by the prosecution, there is no material capable of suggesting that the statement was other than voluntary. The defence is an absolute denial of the prosecution evidence. For example, if the prosecution rely on oral statements, the defence case is simply that the interview never took place or that the incriminating answers were never given, in the case of a written statement, the defence case is that it is a forgery. In this situation no issue as to voluntariness can arise and hence no question of admissibility falls for the judge's decision. The issue of fact whether or not the statement was made by the accused is purely for the jury."

Mr. Daley submitted on ground 1 (b) that the learned trial judge having told the jury he had admitted the statement did not go far enough to tell them to come to their own independent conclusion. He said that the omission of the learned trial judge to tell the jury that despite his ruling

their duty was to decide the issue amounted to a misdirection as the jury may have been confused. He referred to **R. v. Seymour Grant** 14 J.L.R. 240 where the learned trial judge told the jury at page 241:

> "In this case, I have decided on evidence which I heard in your absence that the statement which I have just read to you was given voluntarily by the accused. When I was making that determination the truth of the contents of the statement given by the accused was not then of direct relevance. What I had to determine was whether or not the accused gave the statement of his own free will, and I so decided."

Mr. Daley conceded that the point he wished to make was not as strong as that made in **Seymour Grant's** case, yet he relied on the dicta of the court at page 246H-I:

> "In the result, therefore, it appears to us that a great deal of possible confusion would be avoided if judges were to refrain from telling juries why they decided to admit confessional statements. And should the circumstances of any particular case render it necessary so to do, then the judge should take great care to make it quite clear to the jury that they should come to their own independent views as to every circumstance under which the statement is claimed to have been obtained or given, including, if the jury think it relevant, whether it was voluntary or not, and come to their own conclusions as to whether any, and if so what, weight and value should be given to such statement. Failure to do so will more likely than not result in unsatisfactory trials."

In that case the appellant said that he gave the statement but it was induced by the beating he was receiving and a desire for relief. He also said the contents of the statement were not true. In this case, the applicants each denied giving any statement to the police and said they had signed blank sheets of paper which were not identified in court.

In his charge to the jury, the learned trial judge said at page 207-208:

> "Now my duty as a judge is to decide whether or not an admission or a statement made by the accused is free and voluntary in this case. I have decided on the basis of evidence which I heard in your absence that the statement which the accused man is said to have been made by the accused man Clarke, and the statement made by the accused man Murray, I decided that both were voluntary statements.
> Now the truth of the contents of the statement or admission was not directly relevant at the time when I did my enquiry and my decision as to the voluntary nature of the statements. Now however, that I have admitted the statement in evidence, the truth of the matter is contained therein are crucial matters for your consideration and for your decision an admission of guilt or of a fact which tends to proof of such offence may be voluntary and yet it may be quite untruthful.
> It might be quite unsafe to act upon it and it may have no probative value at all. It may be a forgery.
> **Although** I have admitted it in evidence, you will have to say whether or not it was made. You must decide whether or not the statement was made and if so was it free and voluntarily given.
> Then you have to decide what it means, the truth of the matters contained therein and what weight and what value is attached to it. Now in considering what weight and what value is to be attached to it, you are entitled to take into account the manner in which you think the statement was obtained and if you should find that it was not voluntary, then probably you will not attach any weight to the statement at all. A statement made in consequence of violence or a statement made as a result of inducement by promises of favour, a statement made or taken under oppressive circumstances, you should so find such a statement is made less likely to be true than one which was given freely.

> "Now, you should take into account all the circumstances in which the statement was made in assessing its value and in the final analysis the weights and value of a confession remain matters for you." (Emphasis supplied)

It is readily seen that the learned trial judge was clear and explicit in his directions on the jury's role in assessing the statements and there could be no area for misunderstanding or confusion. He continued in this lucid manner (page 208) "if you should find that these confessions were made freely and voluntarily by these accused men, if you accept it, Mr. Foreman and members of the jury it would be open to you to act on it."

In dealing with Murray, he said at page 226:

> "If you should find that he did not make that statement, then the crown's case would fail so far as I see because there is no other evidence that you could act upon safely in arriving at a verdict adverse to this accused man. You will have to consider the circumstances under which the prosecution say it was made and see whether you accept it as having been made.
> If you place no value on it, your verdict must be not guilty; if you are left in a state where you don't know what to say about the statement, whether it was voluntary or not, whether you can rely on it, you can put any weight on it, there again your verdict will have to be not guilty. If you believe that it was, you should find and you feel sure that it was voluntarily given, that you accept the truth of what he said in it, it will be an admission and you may act upon it and return a verdict of guilty."

At page 223 of the transcript he dealt with the confession statement of Clarke thus:

> "Then again you have to consider the voluntariness, for he said he was in pain, wanting to go home.
> Mr. Smalling beat him up and urine in his mouth and that is the reason

> "why he signed, because he was feeling pain and he wanted to go home, so he signed. We don't know what he is saying he signed, but assuming that you should say that that is what he signed, if you should accept what he signed and place some weight on it, then you may well say that in those circumstances the statement, there is very little weight if any at all that you could attach to the statement and in those circumstances you should find that he was not there, he was at his home or if it leaves you in doubt as to whether or not he was at his home, your verdict would be not guilty. If you should find that you cannot attach any weight to the statement, it has no value, there again your verdict would have to be not guilty. If you are left in doubt as to whether or not to place any weight on the statement as in the case of his alibi, your verdict would have to be not guilty. It is only if you reject his alibi completely and you accept that the statement was voluntarily made, and you accept that it is an admission freely given by him of his guilt, it is only in those circumstances would it be open to you to return a verdict of guilty as charged."

The learned trial judge in these directions went much further than the judge did in Grant's case and there is no support for the suggestion that the jury was, or could have been, confused. We find there is no merit in this ground of appeal and it is accordingly dismissed.

Ground 2 complained that the Judges' Rules had been breached and ground 4 that the verdict was unreasonable having regard to the evidence. Both grounds were abandoned by Mr. Daley.

In ground 3 the complaint was:

> "The Learned Trial Judge in pointing out to the jury that the Applicant in his unsworn statement did not tell them where he was at the time of the Murder (P. 224) failed to point out to them that, by his plea of 'Not Guilty' and his denial of having made the Caution Statement the applicant had, nevertheless, expressly or impliedly denied any involvement in the Murder of the deceased."

Mr. Daley submitted that the learned trial judge did not point out that the applicant was denying culpability but on being adverted to page 224 of the transcript where in his review of the applicant's statement from the dock the learned trial judge pointed out to the jury that he said he knew nothing of the murder, Mr. Daley said he could take the matter no further.

Mr. Chuck on behalf of the applicant Clarke said he had filed no grounds but he wished to direct the court's attention to the case of **R. v. Alfred Brown & John Bruce** (1931) 23 Cr. App. R. page 56. The headnote of this case reads:

> "The police have no right to suggest by questions to a person detained in custody that they have evidence of his guilt: answers to such a suggestion are not admissible in evidence."

Winkell, 76 J.P. 191; 1912 approved.

He submitted that when Cpl. Smalling said to the applicant Clarke "we have sufficient evidence to charge you for the murder of Adrian Aird" and Clarke responded "mek me tell you how it go," the words used by Smalling could amount to an inducement, and the inducement may have caused Clarke to give the cautioned statement. Mr. Chuck said he had not framed this as a ground of appeal but advanced it as a matter for the court's consideration.

In the judgment of the Court of Appeal in Brown and Bruce delivered by **Lord Chief Justice Hewart** he said at page 58:

> "..... Thirdly, no doubt in consequence of the absence of legal aid, so-called confessions were admitted in evidence without objection. In the evidence of a police officer one finds this passage: 'In the charge room at Spalding police-station I cautioned the accused and said 'I am satisfied you both know something about taking the glass from the window in Ashwell's shop on the night of the 20th April and stealing the goods'.' I said: 'Do you care to say what you do know?' They both made a voluntary statement."

Brown and Bruce were not represented by counsel. The applicant Clarke was represented by counsel and he denied the oral statement credited to him by the police and he denied giving the caution statement. It therefore was an issue of fact for the resolution of the jury whether the statements orally and written, were made. (See **Ajodha** (supra))

For a statement to be rendered inadmissible, it must be shown that it was induced by force, fear, threat or promise of favour. To amount to an inducement the words or actions used to the prisoner must cause the prisoner to fear or the words or actions must hold out some hope of favour or promise of reward which prompts him to make the statement.

In **Callis v. Gunn** (1963) 3 All E.R. page 677 **Lord Parker C.J.** said at page 680D:

> "There is a fundamental principle of Law that no answer to a question and no statement is admissible unless it is shown by the prosecution not to have been obtained in an oppressive manner and to have been voluntary in the sense that it has not been obtained by threats or inducements."

In **R. v. Richards** (1967) 51 Cr. App. R. 266 it was held that the words "I think it would be better if you made a statement and told me exactly what happened," were held capable of constitutiing an inducement. On the other hand in **R. v. Joyce** (1958) 1 W.L.R. 140 it was held that a policeman's observation "I need to take a statement from you," was insufficient to warrant exclusion of a subsequent confession. These and other authorities indicate that statements of "you had better ....." or it will be better for you "or worse for you" are words that amount to inducements.

In **R. v. Winkell** and **R. v. Brown and Bruce** (supra) the statements were made in response to questions posed by the police. In this case no questions were asked of the applicant by the police. His response was to a statement of opinion made by the police. Since **R. v. Brown and Bruce** (supra) **Winkell's** case has not been followed and we hold it is of no application in this case. "The categories of inducements are not closed" **R. v. Middleton** (1974) 2 All E.R. 1190, but in our judgment to tell a prisoner in custody "we have sufficient evidence to charge you for the murder of ....." does not amount to an inducement. The words do not pose a threat nor do they hold out any promise of favour.

We hold that there is no support for the contention of the applicants and the applications are accordingly refused.