JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 31/83

BEFORE: The Hon. Mr. Justice Kerr, P. (Ag.)
The Hon. Mr. Justice White, J.A.
The Hon. Mr. Justice Ross, J.A.

R. v. DELROY PRINCE

Mr. Ian Ramsay and Mr. Delano Harrison for the Appellant

Mr. Kent Pantry and Mr. John Moodie for the Crown

July 24 & 25, October 14, 1985

KERR, P. (Ag.)

The hearing of this application for leave to appeal from a conviction for murder in the Home Circuit Court before Smith, C.J. and a jury was treated as the hearing of the appeal, the appeal was dismissed and the conviction and sentence of death affirmed.

We now set out herein the reasons for our decision.

The appellant was jointly indicted and tried with Phillip Peart, Michael Howell and Gladstone Francis for the murder of Donna Henry on either the 15th or 16th of August, 1980.

After a trial lasting five days, the jury on the 8th of March, 1983 convicted the appellant as charged and acquitted the others.

The case for the prosecution rested on the evidence of Michael Davis, a mechanical engineer apprentice. The deceased was his girlfriend of sixteen years of age and was his next door neighbour.

On the night of the 15th of August, 1980 about ten o'clock, Davis and deceased having left the home of the deceased for a restaurant on Fernandez Avenue were then en route walking along Langston Road, St. Andrew. At or near premises known as Campbell's Garage four gunmen rushed from the gully, accused Davis of being a socialist and threatened to kill Davis and his girlfriend. The deceased then pleaded with the gunmen that instead of killing them they be taken to "Kojak." The accused Howell is known as Kojak. In response the gunmen took them to the house of Kojak at Jacques Road and handed them over. Davis' graphic account of what happened thereafter was a narrative of the commission of an atrocious murder. The expected aid and comfort from Kojak was not to be. According to Davis, Kojak got a rope and said he was going to kill Davis as he had wanted his cousin Roland Murray and could not get him. The accused Peart known to the witness, as "Goatie" then left and quickly returned with about four other men including one Tony, who was not before the Court, the accused, Gladstone Francis known to him as "Gorgon" and the appellant nicknamed, Cobra. Tony took charge of the proceedings. He then felled Davis with a blow from his gun, tied Davis' hands and feet and gagged him. Kojak then pulled the rope off Davis' feet and used it to tie Davis and the deceased together. It was elicited in cross-examination that the deceased was also accused of being a political spy. From the house Davis and the deceased were marched along the road by a squad consisting of five men, the four accused and Tony. They were apparently being taken to a place of execution. Gorgon led off from the yard at Jacques Road calling on the others to follow. None of the original four men formed this procession. Of the five men only the appellant and Tony were armed with guns. Kojak held the rope that bound the witness and the deceased together. The route

taken led through a gully to Mountain View Avenue.

As they entered Mountain View Avenue the order was Gorgon in front then Kojak with the lead rope, Cobra (appellant) with gun pointed at the head of the deceased, Tony with gun pointed at Davis and Goatie in the rear. On Mountain View Avenue a motor vehicle with bright lights came along. Gorgon had then crossed the road. Tony then said "Mek we do it now." Davis was suddenly pulled to the ground by the deceased and he heard the explosions of shots being fired. He fell on top of Donna; he rolled off and then he saw the appellant and Tony firing shots. He remained still pretending to be dead, and they left him lying there. About half-an-hour after the police came and cut him loose from the deceased. He then saw what apparently were portions of her brain coming from a wound in her head. He received wounds to his elbow but he was unable to say how he got them. He then took the police to Kojak's house at Jacques Road. The police took two accused from that house and two from another house nearby. He identified them as four of the men who took deceased and himself to Mountain View Avenue to kill them. Where the shooting took place the street was well lit with fluorescent lamps. There was also light in the house at Jacques Road. To cross-examination of appellant's counsel he said he knew the appellant for about four years, he had often seen him on Langston Road. He had never been to Kojak's house before that night but he used to work at No. 2F Jacques Road with Lorenzo Pennant, a radio technician for two years up to 1976. On the journey from Jacques Road to Mountain View Avenue deceased and himself fell more than once. In cross-examination by Kojak's attorney he said that it was Tony who directed Kojak to tie him.

Dr. Mariappu Ramu who performed the postmortem on the body of the deceased in evidence said that he found:

(1) A firearm entry wound to the back and inside the left forearm; the bullet passed through the arm making its exit at the front.

(2) A firearm entry wound to the right temporal region of the head passing into and lacerating the brain.

(3) A firearm entry wound to the right buttock.

In his opinion death was due to shock and haemorrhage from gunshot wounds mainly to the head. The absence of burning, blackening and tattooing around the entry wounds indicated that the firearm was discharged at a distance of more than eighteen inches from the body of the deceased.

Howell's (Kojak's) defence as indicated in cross-examination and as averred in his statement from the dock was duress. According to him Tony and other gunmen, the witness Davis, and the deceased came to his home. Davis and deceased were tied up. He was ordered to walk with them. A van came along. The tied up persons fell in the road and then Tony said "mek we finish them here," he ran off and went to his home. In a statement to the police he admitted tying the witness Davis and the deceased on the instructions of Tony.

Poart's defence was that he was a mere on-looker. In his statement from the dock he said he was standing in a crowd and saw the witness Davis and the deceased with a "set of men."

Gladstone Francis in his statement from the dock, said on the night in question he was at his gate, when the gunmen escorting Davis and the deceased came to him and asked where "Kojak" lived. He saw the gunmen tie up Davis and deceased and led them away.

The appellant's defence was an alibi. In his statement

from the dock he denied knowing anything about the affair. He was sleeping at home with his baby mother when soldiers broke into the house and started to beat him up. He became unconscious and recovered consciousness at the Elletson Road Police Station. There he was questioned and beaten. Inspector Thomas beat him with a cricket bat. Thomas brought him a paper to sign and as he could not stand the beating he signed it.

The admissibility of that statement was hotly contested. After a trial within a trial in the absence of the jury the learned Chief Justice ruled the statement admissible.

Before the jury defence attorney, as he was entitled to do, cross-examined the prosecution witnesses, concerning the circumstances under which the statement came into existence in order to show (1) that the statement tendered was not dictated by the appellant and (2) that his signing it was not a voluntary act.

In that statement the appellant had said that he saw Tony, one David, and accused Kojak, coming along Jacques Road with a woman and a man tied together. They were going towards Mountain View Avenue. Tony asked him to come with them and he followed. On reaching Mountain View Avenue, he saw David and Tony firing shots and the woman and man fell. They all then ran.

The first two Grounds of Appeal argued were complaints against the judge's directions in relation to the confession statement of the appellant. There has been no challenge to his ruling on the admissibility of the statement. In his direction to the jury after briefly referring to the evidence of Detective Inspector Lloyd Thomas and Inspector Linton Chambers to the effect that the statement was voluntarily given and dictated by the appellant the learned Chief Justice said (pp. 312-313):

"Now members of the jury, as I have said, Mr. Prince has denied this. He was given some papers to sign and he signed it to please the inspector, to spare himself from further beating. If he signed a statement in those circumstances, it is not his statement. He doesn't know what was in it, according to the accused. It was presented to him as a statement and he was asked to put his name to it. That wasn't his own statement. You can't take a statement like that into account; something that didn't come out of his mouth. So, if you believe that he didn't give the statement; you are not sure about it, you must disregard it. If you believe he dictated the statement to the inspector, then it is a matter of fact for you to say what value you place on the statement; of what value is that evidence.

If you believe he didn't speak the truth when he said that he didn't dictate it, if you believe he actually dictated it, but you believe that he was beaten to give a statement; in other words, if you disbelieve Inspector Thomas that it was a free and voluntary statement, and what you believe is that he was beaten in order to make him give a statement against himself, then, you will have to say whether a statement given in those circumstances has any value as evidence at all. In other words, a man can be forced to say something which is false; and a man can be beaten to give a statement and yet is speaking the truth. But if you believe he was beaten to make him give a statement to implicate himself, then perhaps you will say well, you know, I am not sure whether he spoke the truth or he just told lies to save himself from further beating. So, although you might disbelieve him that he didn't dictate it you still have to consider whether what was said about the beating influenced him against his will to state something which wasn't true.

In the final analysis you will have to say whether you believe he dictated the statement; if so, what value as evidence, you place on it."

In his first challenge to the correctness of these directions Mr. Ramsay submitted that in the sentences underlined the learned Chief Justice erred seriously in Law; that instead of telling the jury forthrightly that if they found the accused's statement to be induced by a prior beating administered by a person in authority they were to disregard it as of no value and weight whatsoever "he left such poisonous thoughts in the minds of the jury" that the correct directions given later could not cure the earlier misdirections. He cited in support R. v. Sparks (1964) 1 All E.R. p. 727 at p. 740 (G), R. v. Grant (1976) 14 J.L.R. 240 and R. v. Moon (1969) 3 All E.R. 803.

Now after this passage, of which complaint was made, the learned Chief Justice reviewed in detail the evidence given by the witnesses Inspectors Thomas and Chambers and referred therein to certain suggestions put in cross-examination as well as the appellant's statement from the dock relative to this issue and then concluded in the words approved by Mr. Ramsay thus (p. 315):

> "As I have said, members of the jury, you will have to decide whether, in fact, he gave the statement at all. If you believe he didn't and it was a concocted statement, disregard it. If you are not sure if it was concocted, disregard it. If you believe he dictated it but was forced to dictate it, you will disregard it but if you believe the police witnesses that this was a freely and voluntarily dictated statement by the accused, Prince, in circumstances where he hadn't been beaten or forced, you take it into account and see if it is favourable either to him or against him, insofar as it is sought to implicate him in his defence."

This Court in R. v. Grant (supra) had to consider the respective roles of judge and jury in relation to a confession statement. As a result of the appeal rested on the Court's assessment of the effect of the summing-up in the particular case it is enough to refer to the principle propounded in the case and concisely summarized in the following excerpt from the headnote thus (p. 240):

> "Voluntariness, as a test of the admissibility of a confessional statement by an accused, is a question for the trial judge and for him alone. When, however, a statement has been admitted in evidence, voluntariness may become a question for the jury if they consider it to be a relevant factor in deciding the truth or falsity of the contents of the statement."

In the course of the judgment Leacroft Robinson, P. industriously reviewed and quoted dicta from a number of Commonwealth cases. We find the references and his comments relative to the criticisms of Mr. Ramsay and accepting his citations and quotations as accurate we quote in appreciation from his judgment at pp. 242-3:

> "..... If the judge applies that test and concludes that the statement was not voluntary, then that is an end of that matter. The statement is not admitted in evidence, the jury are not made aware of its contents and therefore, are not concerned with its truthfulness or otherwise. On the other hand if the judge applies the test of voluntariness and, concluding that the statement was voluntary, admits it in evidence, then the jury are obliged to consider the statement, its contents and what weight and value should be given to it. In so doing, they are entitled to consider, inter alia, the circumstances under which it came to be obtained and to form their own opinion as to those circumstances. That opinion may well be that it was not a voluntary statement. But even if they so concluded that is not an end to the matter because voluntariness is not an absolute test of the truth of a statement. It may or may not be, depending on the

"circumstances, and they may well feel that although in their opinion it was not a voluntary statement that, nevertheless, its contents were true and may safely be acted upon.

.....

Then again they may conclude that it was the accused's statement, that he gave it voluntarily, but that its contents were not true. And, of course, they may do no more than entertain genuine doubts. All these are matters for the jury."

And later at p. 243:

"The complete and unfettered independence of the jury, in deciding on the weight and value to be given to a confession that has been admitted in evidence by the trial judge, has also been emphasised by the High Court of Australia in Basto v. R (1954) 91 C.L.R. 628. In that case, the view expressed in R. v. Bass (1953) 1 All E.R. 1064; (1953) 1 Q.B. 680; (1953) 2 W.L.R. 825 that if a statement has been admitted in evidence the trial judge should tell the jury that if they are not satisfied that it was made voluntarily they should give it no weight at all and disregard it, was rejected by the court and its views as to the jury's functions in this regard were expressed thus (1954), 91 C.L.R. at p. 640:

'Once on the evidence is admitted the only question for the jury to consider with reference to the evidence so admitted is its probative value or effect. For that purpose it must sometimes be necessary to go over before the jury the same testimony and material as the judge had heard or considered on a voir dire for the purpose of deciding the admissibility of the accused's confessional statements as voluntarily made. The jury's consideration of the probative value of statements attributed to the prisoner must, of course, be independent of any views the judge has formed or expressed in deciding that the statements were voluntary (sic) Moreover, the question what probative value should be allowed to the statements made by the prisoner is not the same as the

> 'question whether they are voluntary statements nor at all dependent upon the answer to the latter question. A confessional statement may be voluntary and yet to act upon it may be quite unsafe; it may have no probative value. Or such a statement may be involuntary and yet carry with it the greatest assurance of its reliability or truth.'
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> On the other hand, a jury may very well consider their opinion as to the voluntariness or otherwise of a statement to be a relevant factor in determining its probative value or effect."

The learned President after referring to R. v. Sparks (supra) and the entitlement of the defence to re-open before the jury the issue of the circumstances surrounding the taking or giving of the statement continued:

> "It does not of course, follow that a jury will necessarily attach no weight whatever to a statement because they were not satisfied that it was a voluntary statement, hence the view expressed in R. v. Bass (supra) and followed in R. v. Sutherland and Johnstone (1959) C.L.R. 440, was not only rejected in the Basto case (supra) but also conclusively so by the Court of Appeal itself in the later case of R. v. Ovenell (1968) 2 W.L.R. 1543; (1969) 1 Q.B. 17, (1968) 1 All E.R. 933 at p. 934, where it was held that:
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> > 'in deciding in criminal cases on the admissibility of an accused's admission in evidence, the question of its admissibility, and for this purpose the question whether it satisfied the test of voluntariness, was a question for the judge to decide, but the weight to be attached to the evidence, if admitted, was for the jury; accordingly a jury should not be directed, when considering the weight of the evidence, that unless they were satisfied that the admission was made voluntarily, they should disregard it.' "

He then turned his attention to dicta in the same vein in the Canadian cases of R. v. McLaren (1949)2 D.L.R. 682; and R. v. McAloon (1959) O.R. 441.

In our view the common theme running through the dicta from the cases and approved in principle by this Court in R. v. Grant is that once the judge has admitted the statement in evidence, the weight to be attached to it is entirely a matter for the jury and that as involuntariness in the making does not necessarily make the statement untrue, there is no duty on the trial judge to direct the jury that "unless they are satisfied that the admission was made voluntarily they should disregard it."

In the instant case in making those observations in the sentences underlined the learned Chief Justice was relating the "facts of life." A fair assessment of the passage, however, is that in the opinion of the learned Chief Justice, although a truism, the better approach and the one he commended to the jury was to consider an involuntary statement as having little or no probative value. There the learned Chief Justice was dealing with the generalities. He then went on to deal with the special circumstances of the case and concluded on that note unduly favourable to the defence in the light of the observations in Grant's case (supra).

In our view there was no misdirection here necessitating express admission and correction as in R. v. Moon (supra).

The second complaint was founded upon the following passage (pp. 316-7):

> "Now, the accused has said he was beaten to sign a concocted statement. Well, members of the jury, if Inspector Thomas concocted this statement, the Inspector doesn't have any sense because he concocted a statement which doesn't implicate Prince at all. If you take this into account he doesn't know anything about it. He is not a party to it so the Inspector is very, very amateurish to concoct a statement like that. So, you see, if you believe the accused, he doesn't know anything about it and this statement doesn't implicate him at all. What it does is to put him on the scene which is contrary to what he told you from the dock but it doesn't say that he did anything which would implicate him in the crime. So, what he said in the dock and what he said in the statement exonerates him altogether from the offence. If you believe he gave it freely and voluntarily, it still doesn't implicate him in the offence. So, if you believe what he said there is truth and not what he said in the dock, you still have to acquit him, if you believe that is all he knows about it. So, either on what he told you from the dock - where he said he wasn't out there at all and the first thing he knew is when the police came to him - or what he said in the statement - if you believe either account you must acquit him and if you are not sure whether either account is true or not you must acquit him as well."

In ornate and somewhat extravagant language it was submitted that the learned Chief Justice went out of his way to suggest that the statement did not implicate the appellant and this was "especially damming" because:

> (1) It suggested that the Police did not concoct the confession because they obviously could have done much better.

(ii) By playing down the real effect of the statement a "time bomb was thereby placed under the defence which on further consideration would explode with disastrous results, namely that that version of the accused's movements could not be true and therefore the confession statement if believed must wholly contradict the defence in Court; once it was believed that the accused was admittedly on the scene then the way was open for the jury to accept the evidence of the sole prosecution witness with the clearest of intentions."

Now of the men who escorted the witness Davis and the deceased, only the appellant and the absent Tony were armed according to Davis. Accordingly, the basis on which all four accused were jointly indicted was common design. The learned Chief Justice's directions on common design were impeccable. He collated the evidence against each accused as to the role played by that accused and juxtaposed that evidence with his specific defence. Of the acquitted accused, Howell's defence was duress, Peart's innocent presence and Francis an innocent bystander. It was therefore necessary for the trial judge to advise the jury that mere presence at the scene was not sufficient to implicate an accused in the commission of the offence. Therefore in the manner in which the trial judge directed the jury in this passage he was not putting forward the acceptance of the statement in its entirety as part of the defence, but a consideration in the event they did not accept the evidence of Davis and had a reasonable doubt as to the part played by the appellant. This was clearly so, as immediately after that passage he said (p. 317):

"The prosecution must make you feel sure he took part in what took place that night and so what you will be left with if you come back to the evidence of Michael Davis and if, on the strength of what Michael Davis said, you are not sure if he took part in the killing of the deceased or not you must acquit him."

This is in keeping with his earlier directions when he said (pp. 273-274):

> "It is for you to say whether Michael Davis was a truthful witness, because if you think that he is a liar and you can't rely on everything he says, well you can right away acquit all four accused, because if you don't believe him in what he says, then you must acquit the accused. The case depends on his evidence, and so before you can convict any of the accused you will have to find that he was a truthful witness."

His remarks to the effect that the concoction of a statement such as that tendered would be inept were comments which in our view did not go beyond the permissible limits, he having carefully advised them (p. 268):

> "If I make any comment on the evidence - if I express my view of the facts and you do not agree with the view I express, do not agree with my comments, you are under the duty to disregard and reject the view I express and substitute your own. If any view I express you think is helpful and can assist you in coming to your decision, you are free to use what I say in your deliberation."

On the evidential value of an extra-judicial admission when put in by the prosecution, Lawton, L.J. in R. v. Sparrow (1973) 1 W.L.R. at p. 492 had this to say:

> "The trial judge had a difficult task in summing up that part of the case which concerned the appellant. First, he had to try to get the jury to understand that the appellant's exculpatory statement to the police after arrest, which he had not verified in the witness box, was not evidence of the facts in it save in so far as it contained admissions. Many lawyers find difficulty in grasping this principle of the law of evidence."

It is not unusual that an extra-judicial statement put in by the prosecution contains an embryonic exculpatory issue. Where, however, the defence not only fails to develop the issue but virtually kills it by raising a defence wholly incompatible with the exculpatory parts of the statement, then that issue is no longer a 'live one' meriting the jury's consideration. To us this seems implicit in the statement of Lawton, L.J.

In the instant case, the learned Chief Justice put the statement in proper perspective when he said (p. 331):

> "Now, if you believe the statement which was put in evidence as being dictated by the accused, Prince, if you believe that it was in fact dictated by him, and that it was done in circumstances where he was not forced to do so, then when you take that statement together with what the witness, Davis, said, the accused is admitting being on the scene, although as I indicated to you when I was dealing with the statements, he has admitted being on the scene in circumstances where he was innocent of the events of that night. But nevertheless, it could be evidence upon which he was on the scene."

It is to do a disservice to a summing up to take in isolation certain passages and interpret them without due regard to other passages treating with the same questions or issues.

We consider the summing up dealing with the confession statement as a whole and are of the view that the criticisms are unmerited and that the summing up on this aspect of the case was not only fair and clear but at times highly favourable to the defence.

The following ground was argued by Mr. Delano Harrison.

> "That in relation to who actually shot the deceased the learned trial judge usurped the functions of the jury in:
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> (a) finding facts and not leave them to find the aforesaid fact and (b) that the finding of the aforesaid fact depending on circumstancial evidence and the directions in law where entirely omitted from the learned trial judge's directions."

Mr. Harrison argued that as there was no direct evidence as to who shot the deceased, the directions should be given in keeping with the rule in Hodge's case (1838) 2 Lewin C.C. 227 as approved by this Court in such cases as R. v. Bailey (1975) 13 J.L.R. 46; R. v. Lloyd Barrett (unreported) Supreme Court Criminal Appeal No. 151/82 and R. v. George Edwards (unreported) Supreme Court Criminal Appeal No. 32/83, judgment delivered December 16, 1983.

In our view this is not a case based upon circumstantial evidence requiring directions along the lines advocated in R. v. Bailey (supra). The case for the prosecution rested on the direct testimony of Michael Davis and the inferences to be drawn from the primary facts of which he testified. In his further directions to the jury Smith C.J. emphasized the importance of Davis' evidence thus (pp. 341-2):

> "As I told you, you will have to say whether, because he said he didn't actually see who shot the deceased, whether there were circumstances which were described by the witness from which you can infer inescapably that the accused Prince was one of the men who were firing at the deceased.
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> He said, 'When I fell I saw two men firing.' You will have to say whether you can infer inescapably that the accused Prince - if you believe he was there - was one of the men who were firing at the deceased. And what I told you was that if you believe that there were two men firing at the deceased soon after they fell, and those were the only two men with guns, and if you

> "beleive that one of the men was the accused Prince, then, it wouldn't matter whether it was a bullet from Prince or from the other man that struck the deceased and killed her."

These directions are free from fault and appropriate to the facts and circumstances of the case and the issues in contention.

This ground of appeal therefore failed.

For these reasons, the appeal was dismissed and the conviction and sentence affirmed.