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JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEALS NOS. 1, 2, & 3/79.

BEFORE: THE HON. MR. JUSTICE ZACCA, J.A. - PRESIDING
THE HON. MR. JUSTICE KERR, J.A.
THE HON. MR. JUSTICE CARBERRY, J.A.

REGINA

VS.

DENNIS THOMPSON
ANDREW SCARLETT
FRANCIS WOODHOUSE

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Mr. K. St. Bernard for Thompson.

Mr. A. Gilman and Miss A. Haughton for Scarlett.

Mr. K.D. Knight and Miss A. Tapper for Woodhouse.

Mr. A. Smellie and Mr. M. Dukharan for the Crown.

May 5, 6, 7, 1980; April 3, 1981

KERR, J.A.:

Upon these applications for leave to appeal from convictions for murder coming up for hearing, Mr. Gilman for Scarlett and Miss A. Tapper for Woodhouse each in turn frankly advised the Court to the effect that Counsel having carefully read and considered the transcript of the evidence and the summing-up of the trial judge were of opinion that there is nothing that could usefully be urged in support of the applications. Accordingly, the applications of Scarlett and Woodhouse were refused.

The application of Thompson was treated as the hearing of the appeal. The appeal was dismissed and the conviction and sentence affirmed. We now set out herein our reasons for so doing.

The applicants were jointly tried and convicted in the Home Circuit Court December 1978, before Carey, J. and a jury for the murder of Roan Burt.

The deceased and his wife Gertrude lived together at Old Works, Queens Hill in the Watermount area of St. Catherine.

According to Mrs. Burt on January 27, 1977 at about 7.00 p.m. the deceased, Sydney Thomas and herself left for Kitson Town in the car of deceased and driven by him. When leaving the house was closed - doors and windows - and the electric lights were on. All three, returned at about 9.00 p.m. Deceased stopped the car about forty feet from the garage and Thomas went towards the doors of the garage while she went towards the house. As she approached the house, she saw the moving shadows of persons inside the house and then she saw a "bunch of men" running through the house - she shouted "Thief - thief" and ran back towards her husband, but before she could reach him she was stopped by two men armed with guns who ordered her not to move. She said she could see the men who were arms length away by the light reflected from the house which was more lit up than when she left and from the moonlight. She identified the accused Woodhouse and Scarlett as the two men. As her husband came towards her from the garage there was an explosion and her husband cried out "Lawd a dead mom and fell. A second shot was then fired at him. Both shots came from Woodhouse's gun. Scarlett and Woodhouse then went to the deceased and searched him. As she ran towards the verandah a third gunman approached saying "Don't move - don't go anywhere". She begged him not to kill her and he then left and joined the others in searching the deceased. She identified the accused Thompson as this third man. On entering the house and approaching the dining room she noticed the house was ransacked and a door was now open. She heard the sound of the car leaving the garage and she looked and saw Thomas standing as if transfixed. He then joined her in a flight through a cane field to her sister's home where she made an alarm. She returned to find her husband dead. Louvre blades had been removed from a window leaving space sufficient to admit an adult.

The car, an Austin Cambridge Registration No. ND 6984, the wrist-watch the deceased was wearing and his revolver were missing. Woodhouse she said was known to her as "Pre" - she knew him for over sixteen years; when he was a small boy his mother used to work in the home and when he grew up he had worked with her husband. She pointed out Scarlett and Thompson at identification parades held at Spanish Town on March 2. She had seen her husband's car at the Central Village Police Station on January 31, - it then had on a different registration plate FP 4618.

Sydney Thomas of sixty-eight years of age, of sometimes watery eyes, was described by the trial judge as laconic. His evidence in chief was terse and to the effect that he saw the three accused at Burt's home - they had guns and two of them shot the deceased. Woodhouse he knew before and Scarlett he identified as the one who drove away the car after Burt was shot. At the identification parades he pointed out Scarlett but failed in respect to Thompson. Cross-examination elicited that on arrival at the home he was given the keys by the deceased to open the garage. After he had done so, he saw shadows of men in the house. He was "stuck up" by a gunman and two others ran past and ordered Mrs. Burt not to go in the house. She pleaded with them. He heard two explosions. After the first explosion the deceased fell crying "Lord I dead" - he was shot at again after he fell.

Dr. Jadhav Rangrao who performed the post-mortem on the body of the deceased and whose deposition at the preliminary examination was read to the jury deponed:-

> "On external examination I found a round penetrating wound on the right thigh at its middle part on the lateral aspect. Lateral means side. The wound had black margins resembling metal burns.
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> On dissection I found fracture of the right thigh. The femur is the thigh bone. Rupture of the femural vessels, that is blood vessels at the thigh, and blood accumulated around the vessels about one litre..... In my opinion death was due to haemorrhage by rupture of the femural vessels and shock."

Louis Miller gave evidence that on the night of January 29, 1977, (two days after the murder) while riding his motor cycle along the main road from Central Village to Spanish Town he was knocked off the cycle by a blue Austin Cambridge car FP 4618. The car was being driven by Scarlett. There were two passengers in the car, and appellant Thompson was one. He knew all three men before but the third man was not before the Court. In cross-examination he admitted that although he had later seen the car at Central Village Police Station it was not until a week after that he made a report to one Inspector Dawes.

Detective Kelso Small on receiving a report of the events at the Burts home on the night of January 27, visited the premises of the deceased shortly after, and on the same night. In the course of investigations he went to the home of the appellant Thompson on February 12, arriving there about 6.00 a.m., and took him to the Spanish Town Police Station - to the office of Detective Inspector King; he left him there and went to Central Village where he took accused Scarlett into custody. Scarlett was wearing the watch identified by Mrs. Burt to be the one the deceased was wearing when he was killed. At Scarlett's home he found both the blue jean overall and the tam described by Mrs. Burt as the clothes the accused was wearing when she saw him at her home. On August 4, 1977 he arrested Woodhouse at the Spanish Town lock-up and on being cautioned according to Small he said:-

> " 'Is the other boy them force me to carry them up there go kill the man.' "

The prosecution also tendered a written confession given by the appellant Thompson. Its admissibility was challenged by the defence and as the judge's ruling is being questioned on appeal this will be dealt with later. In the statement the appellant Thompson admitted going to the home of the deceased with three others including one Jango who had a firearm but said that he and another were in hiding in the cane field when the deceased was shot.

In addition to the challenges to the admissibility of this statement and complaints as to the quality of the evidence of identification given by Mrs. Burt and Thomas under testing cross-examination, the appellant Thompson, as did the other two accused, gave an unsworn statement denying that he was ever at the home of the deceased or that he knew anything about the murder. Thompson re-asserted in his statement from the dock that he was beaten and threatened and alleged that he gave the statement to avoid further beatings and that the contents of the statement were untrue.

The first area of complaint as set out in the prolix grounds of appeal may be summarised:-

(a) That the learned trial judge erred in ruling at the end of the "trial within a trial" that the written confession was admissible.

(b) Alternatively if he was correct in so ruling subsequent evidence which was elicited was sufficient to warrant his withdrawing from the jury the statement previously admitted, and

(c) That instead of so doing, he abdicated his function by leaving it to the jury to decide whether or not the statement was voluntarily given.

In support, Mr. St. Bernard adverted to certain passages in the Guyanese case of The State vs. (i) Abdool Azim Sattaur (ii) Rafeek Mohamed Criminal Appeals Nos. 9[illegible] & 95 of 1975, (unreported), which he considered fortified his submissions.

The circumstances in which the confession was taken and the issues arising from the challenge to its admissibility were fully aired in the "trial within a trial".

According to Detective Sergeant Morrison he was a very good friend of the father of the appellant Thompson and through that association he knew the appellant for about ten to twelve years. On the morning of February 12, 1977, he saw the appellant in Inspector King's office at Spanish Town. As he approached the appellant said:-

> " 'Come yah sah, come yah. You know me, you know me father. I don't know how I get in this thing. I going tell you.' "

Morrison replied:-

> " 'You are a K.C. boy. You want to write it or you want somebody to write it for you? He said, 'I want somebody to write it.' "

He then left to the C.I.D. office where he spoke with Sergeant Robinson. Robinson and himself returned and spoke to the appellant. He left and returned sometime after. Mr. Tennant a Justice of the Peace was there then. Robinson wrote the caution, read it and give it to the appellant. The appellant signed it and both he and the Justice of the Peace also signed. The appellant gave a statement witnessed by Tennant and himself. Neither he nor anyone to his knowledge threatened or used any force to induce the appellant to give the statement. He was closely cross-examined and he said that he arrived at Spanish Town at 9.00 a.m.; he reiterated that he had been a friend of the appellant's father since the father was at Caymanas Estate as an Engineer and that he had on occasions paid several social visits to his home and been with him on home-guard patrol. In the giving of the statement routine questions were asked but those questions were not written down. Morrison denied that in his presence Evans, a police officer, beat the appellant on the bottom of his feet with a hammer. The appellant was not stripped down to his underpants and beaten and threatened before Tennant arrived.

Dudley Tennant, the Justice of the Peace, in his evidence said that in response to a message he attended at the Spanish Town Police Station at about 10.30 - 11.00 a.m., February 12. Shortly after Detective Sergeant Morrison came to the office where he was with Detective Sergeant Robinson, other policemen and the appellant. In the appellant's presence Tennant said he was told by Robinson that the appellant Thompson was a suspect in a case of Robbery and had expressed the wish to make a statement. To this, on his enquiry, the appellant had answered in the affirmative. He Tennant understood that he was there to see that no threat, promise or inducement was offered to the accused to make the statement and he explained this purpose to the appellant. The appellant said he preferred someone else to

write his statment. Tennant corroborated Morrison as to the writing of the caution and the witnessing of the statement. No violence or threat was used or made to the appellant. The statement was voluntarily given. The appellant appeared worried and frightened.

In cross-examination he said he did not see Detective Evans but Detective Kelso Small was there for a short time.

Sergeant Robinson, who wrote the statement, corroborated Morrison and Tennant concerning the taking of the statement.

In cross-examination he said he arrived at the police station at 7.45 a.m. and saw the appellant for the first time at about 9.30 a.m. He denied being at the police station at 6.30 a.m., when Kelso Small brought in the appellant. He denied suggestions of (i) choking the appellant by putting a chain around his neck; or (ii) that Morrison and himself threatened the appellant before the arrival of the Justice of the Peace; or (iii) questioning the appellant during the taking of the statement.

The appellant Thompson gave evidence on the voir dire to the effect that at about 5.30 a.m., February 12, Detective Kelso Small came to his home and asked him about a murder; he told Small he knew nothing about any murder. He was taken by Small to the Spanish Town Police Station arriving there about 6.00 a.m. There in an office he saw Sergeant Robinson. When he denied knowing anything about the murder Robinson put a chain around his neck and tied it until he was breathless. After removing the chain Robinson punched him in the stomach and took him into another room in which were Detective Morrison and Evans. He says that he then said:-

> " 'Mr. Morrison, you know my father and you know me and I don't know anything about any murder.' "

He asked Morrison to help him not to go through further punishment. Detective Small was not then present. In response to an order he stripped down to his under-pants; he was then handcuffed and put to lie on the ground and Detective Evans beat him on his "foot bottom" with a hammer. He could not stand the beating and he answered "yes" to

certain questions put by Morrison. He was told that a Justice of the Peace would be sent for and if he complained a worse beating would be given him. When Mr. Tennant came he made no complaint to him because he was afraid. He signed the statement because he was afraid. The statement was in response to questions asked. There was no truth in the statement. In cross-examination he said he never received any medical treatment for the beating and he made no complaints about it to anyone.

After addresses by Counsel for the prosecution and for the defence, the trial judge reviewed the evidence on the voir dire and ruled:-

> "In the result I do not accept the evidence that this man was physically assaulted; and the statement that he gave was given freely and voluntarily. I rule that the statement is admissible and the jury should be recalled." (See pages 254-255 of the transcript).

We have given careful consideration to the passages in The State vs. (i) Abdool Azim Sattaur (ii) Rafeek Mohamed (supra) referred to by the appellant's attorney. The judgment shows industry in research. We regard this case, [amongst other virtues] as illustrative of the sort of factors that should weigh with a judge in ruling a confession as inadmissible. Mr. St. Bernard frankly admitted that the factors in the cited case were more compelling in that regard than the instant case.

In our view the practical and commendable approach of an appellate Court to rulings of this kind, is that advocated in the speech of Lord Salmon in Director of Public Prosecutions v. Ping Lin (1975) 3 All E.R. p. 175 at p. 188:-

> "The somewhat pedantic approach which seems to have been adopted in some of the cases to which we have been referred should be avoided. These cases are of doubtful validity and of little, if any, value. The Court of Appeal should not disturb the judge's findings merely because of difficulties in reconciling them with different findings of fact, on apparently similar evidence, in other reported cases, but only if it is completely satisfied that the judge made a wrong assessment of the evidence before him or failed to apply the correct principle - always remembering that usually the trial judge has better opportunities of assessing the evidence than those enjoyed by an appellate tribunal."

Neither in his assessment of the evidence nor in his application of principles has it been shown that the learned trial judge erred. His ruling therefore, was upheld.

Before the jury, the cross-examination concerning the taking of the statement was virtually an encore. Greater emphasis, however, was now placed on the time of arrival at the station of Detectives Morrison and Robinson. Morrison said that at 6.30 - 7.00 a.m. he was at his home at Duhaney Park. Robinson denied being at the police station at 6.00 a.m. At that time he said he had not left his home in Mandeville.

Kelso Small, however, said that when he took the appellant to Spanish Town Police Station about 6.15 a.m. both Morrison and Robinson were there and he left him with Morrison and went to Big Lane. He remember seeing Mr. Tennant, the Justice of the Peace at the police station after he returned from Big Lane. He denied punching the appellant in the stomach. Howard Evans, Detective Constable, in cross-examination said he first saw Thompson at the police station on February 12, about 6.30 - 7.00 a.m. He saw Small when he brought the appellant to the office of Detective Inspector King. He did not see either Morrison or Robinson then nor at 8.30 a.m. He saw them later about mid-day. He denied beating the appellant on his 'foot-bottom' with a hammer.

It is clear from the authorities and consonant with good sense that, even after a judge has correctly ruled that a confession by an accused is admissible, if during the course of the trial subsequent evidence emerged which might lead him to conclude that he was mistaken in so ruling he should re-consider his ruling and if then not satisfied that the prosecution had discharged its burden of proving the statement was voluntary, withdraw it from the consideration of the jury.

As was said in Sinclair v. The King (1946/47) 73 C.L.R. 316 at p. 324:-

> "If, after evidence had been given on the voir dire and confessions had been admitted, the evidence as given before the jury had shown that they ought not to have been admitted, the judge would have acted properly in withdrawing them from the consideration of the jury; or, if much a course might not be sufficient to secure a fair trial, he could have discharged the jury." (See also Cornelius v. The King (1936) 55 C.L.R. p. 235 at p. 249).

Mr. St. Bernard, who appeared for the appellant at the trial, frankly admitted he then made no specific submissions to the trial judge for a re-consideration of his ruling. This however would not relieve the judge of his responsibility if the occasion arose. The factual basis for the submission that the trial judge should have reversed his ruling rested on the evidence of Detective Kelso Small as to his seeing both Sergeants Robinson and Morrison when he took the appellant to the police station shortly after 6.00 a.m. on February 12. This in our view is no more than a discrepancy between Morrison, Robinson and Detective Evans on the one hand and Detective Kelso Small on the other. It was never in issue that both Morrison and Robinson were at the station with the appellant sometime before the Justice of the Peace arrived. It was not a question of opportunity but whether the appellant in fact was subjected to "third degree methods" by the police officers. In our view this was no more than a factor to be considered by the jury in relation to the credit of the witnesses concerned and was eminently a matter for them. The learned trial judge in addition to his general directions to the jury on their approach to inconsistencies and discrepancies dealt specifically with this aspect of the case - thus at page 469:-

> "Now, insofar as the evidence of Morrison is concerned, the evidence was that he first saw the accused Thompson at about nine o'clock on the twelfth of February and he denied suggestion that it was at the station at about six o'clock when Thompson was brought there. You may recall that when Corporal Kelso Small gave evidence his time did not coincide with Morrison, there was a conflict there on that point. I told you about conflicts already. Morrison said at nine, he said at six o'clock."

and again at p. 482:-

> "So that the accused Thompson and Mr. Small are at one as to time at the station. The senior police officer said that it was later on; one said he was in Mandeville, one said that it was in the wee hours of the morning. That is a conflict that you will have to resolve."

Accordingly, we were of the view that there was no evidence subsequent to his ruling on the voir dire that would warrent the learned trial judge in withdrawing the confession from the consideration of the jury.

We now turn to the third limb of complaint that the judge in his directions abdicated his function of ruling on the voluntariness of the statement.

It is trite law that admissibility in relation to an extra-judicial confession is a question for the judge. When admitted it is for the jury to assess its weight. To that end the jury will undoubtedly have to consider the circumstances under which the statement was given - R. v. Grant (1976) 23 W.I.R. p. 132; - (See also Chan Wai-Keung v. R. (1967) 1 All E.R. p. 948).

After a full and careful review of the relevant evidence the learned trial judge said (at pages 477 to 478):-

> "The second limb, plinth, if you wish, of the Crown's case against Thompson rests on this confession. I have admitted the confession in evidence and that is why it is put before you for your consideration. Once I admit that evidence, your responsibility is to see what is its probative value or effect. In other words, what weight do you accord to that confession. And in considering that aspect, what weight you attach to it, you must consider the circumstances in which the confession came to be given, came to be taken. There is a strong suggestion on the part of the defence that that man was tortured, beaten, assaulted, chained around his neck, hammered on the sole of his feet. Again you have to consider these factors to say what weight you attach to that confession, because it is only if the confession is given voluntarily that it has maximum weight. Well, having been admitted, it is for you to say what weight you attach to it. So the second limb is that statement where I have read to you.

> If you look at that statement, and you should look at it very carefully, you look and see what it says; having seen what it says, you ask yourselves what does it mean? How do you construe it? How do you interpret it? and that is a matter entirely for your consideration because that person who made that confession. assuming it was given voluntarily, didn't say that he fired any gun. Its value, its effect is that he was on the spot, as far as the statement goes, quite voluntarily he went along with other people; that would be the effect, he is not confessing that he did it. So you have to look on the statement and see what it says, what do you interpret it to mean."

In our view those directions with commendable clarity advised the jury of their function as regards the statement in evidence and adverted their attention to certain facts and circumstances that were in issue and which demanded their careful consideration.

We find no fault with the directions dealing with this aspect of the case.

The other area of complaint involved wide ranging criticisms of the judge's summing-up with respect to the evidence of identification generally and in particular in relation to Mrs. Burt's evidence and her inconsistencies and that "the failure of the learned judge to adequately deal with this most serious aspect of the case deprived the jury of giving the case for the applicant the consideration it deserved, and so deprived the applicant of an acquittal on the indictment."

The learned trial judge in addition to his impeccable general directions on inconsistencies dealt specifically with such inconsistencies in Mrs. Burt's evidence as appeared to him or were urged by the defence who led evidence in proof of certain alleged inconsistencies from Richard Addison, Hilda Johnson and Minnette Shields, Court Reporters in a previous trial.

It is enough to refer to the passages in the summing-up to indicate the nature of these inconsistencies:-

> "I am able to identify four situations where she is alleged to have made inconsistent statements." (page 460).
>
> "Well now, before you she said that he appeared to have curly hair, but at a previous hearing she said she gave the police the description of a man with curly hair. Well, the question of curly hair is of some importance when one is considering the question of identification. It is a matter for you....."
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> "..... at this trial she said the curtains by the room at the garage had been taken down, but at a previous hearing she was reported as saying that the curtains were closed. Now you must consider this most important point. I suggest to you that this may be of importance because of the lighting at the material time. If the curtains were drawn then she would have less lighting available or, if the curtains were drawn is it reasonable to suppose that there would be more lighting?
>
> Another area I will identify of inconsistent statement is, did she examine the men whom she saw on that night. Before you she said "I examine the men that night". At an earlier time she said "I did not have time to examine them carefully." Well now, you must say whether that is an inconsistency." (page 461).

In addition -

The learned trial judge impressed upon the jury the importance of the evidence of Mrs. Burt and the need for careful consideration of that evidence at page 476:-

> "So far as the Crown's case goes, the case against Thompson depends on your acceptance of the evidence of Mrs. Burt, her identification of Thompson as being the person who was present that night; and I may say at once that the question of identification applies to each accused and that is the crucial question in this case you have to consider in due time and I will draw your attention to the evidence in that regard. You have to consider the nature and the quality and the congency of the evidence as respects identification of each of these accused men."

and at page 486:-

> "Well now, that is his answer to this charge. (I was not there). It amounts to an alibi. And in raising that defence he has created in a significant way the issue of identification. That is the crucial factor in this case and one has to look very carefully at the evidence."

and later on the same page:-

> "He calls in Court reporters who put in, gave evidence about what was said on previous occasions. And, those persons were concerned with what kind of glass, whether the witness said it was plain glass or cutted (frosted) glass, whether the person was curly-headed; what time was available. That is what they are concerned with. All that relates to the question on identification with which I shall deal with by itself."

and at page 492:-

> "So then we have to look at the evidence of Mrs. Burt. Now, when one is dealing with identification, visual identification I must warn you that you must approach such evidence with scrupulous care and attention....."

and on the same page:-

> "....So it behoves you to look at the evidence carefully and what you are concerned about is the nature and quality of the evidence. One, you must decide first of all whether you regard the witness who is telling you about the identification as being a person on whom you can place reliance. Is this a truthful witness? If you make that finding, you then look at what the witness said and see if that evidence is of such a nature, such a character that if you were so situated, as reasonable persons that those situations could show and made you feel sure that the witness could identify the persons in those conditions. To repeat, one of the reasons why Mr. St. Bernard in particular, was - you must have found it very tortuous - going through all the inconsistent statements is to show you you cannot rely on a person who gives inconsistent statements. You must make up your minds about that. Can you accept the witness as truthful? Assuming you can, what did the witness say?"

He then proceeded to review in detail the evidence of Mrs. Burt and adverted their attention from time to time to the comments of Counsel for the accused and then at page 503:-

> "Mr. Foreman and members of the jury, this is a very long case. It is not an "I see" case but I think that you are as equal to the task that faces you. Consider the case against each accused separately. Insofar as Thompson is concerned - well, insofar as all three are concerned its common feature is the question of the visual identification of Mrs. Burt. I think it is on her evidence that one really has to focus. What was the lighting? What

> distance were they apart? What was the emotional condition at the time? Can she be believed on her oath - given those lighting and the physical environment in which this thing took place."

After giving due consideration to the criticisms and complaints of Mr. St. Bernard we were of the view that the summing-up of the learned trial judge was full and fair and that he identified and left for the determination of the jury the important issues of fact.

For these reasons we dismissed the appeal and affirmed the conviction and sentence.