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JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 51/87

BEFORE: THE HON. MR. JUSTICE ROWE, P.
THE HON. MR. JUSTICE CAMPBELL, J.A.
THE HON. MR. JUSTICE WRIGHT, J.A.

REGINA

VS.

EVERTON CLARKE

Howard Cooke for Appellant

Miss Yvette Sibble for the Crown

February 22, 1988

ROWE P.:

Tyrone Davis was killed at Long Pond district in Portland during the night of January 8, 1987. Everton Clarke was arrested next morning in some bushes off the Long Pond Road and charged with the murder of Tyrone Davis. Two persons testified at the trial of the appellant in the Portland Circuit Court before Theobalds J. and a jury that they actually witnessed some of the acts which led to the death of Tryone Davis and one of those witnesses positively identified the appellant as the assailant.

Just prior to his apprehension, the appellant was shot and wounded by the police. There was a dispute at trial as to the circumstances which immediately preceded the shooting. It was alleged by the prosecution that upon being shot the appellant was taken to the main road and after caution, he said: "A mi kill Beckoo. A never mean to kill him. Mi only plan to rob him and him start to fight me." The appellant also said

that he had taken a sum of money from Beckoo, the nick-name by which the deceased was known.

Between January 9 and January 15, 1987, the appellant was hospitalized under police guard in the Port Antonio Hospital. He was released into the lock-up at the Police Station on January 15 and on the following day, the prosecution alleged that he gave a written statement under caution. After a hearing on the voire dire, the learned trial judge admitted the statement into evidence. That statement was challenged by the defence on a number of bases. The appellant said that he was shot at Long Pond road in cold blood and that the same officer who shot him took him from the cells at the Police Station on January 16 and asked him if he wanted another shot. This, said the appellant, caused him to feel coward and that was his state of mind when he was interrogated by the officer who gave evidence of having taken the written statement from the appellant. Further the appellant said that he was put in fear by the officer. This is how he described the scene:

> " Mr. Bailey ask me if is me kill the man and I told him, no.
>
> Q: After Mr. Bailey spoke what next took place?
>
> A: Then he start to stamp his feet on the ground and start to lick his hand on the desk, sar, and him tek the gun and lick down on the table and say I must tell him the truth sar."

The appellant said that he consistently denied all knowledge of the killing. He admitted that a female Justice of the Peace arrived in the room in which he was and that he signed a paper but he did not admit that he had narrated to the police the contents of that statement.

In his summation to the jury the learned trial judge explained what were his functions in relation to the caution statement and what he considered to be the functions of the jury in relation thereto.

We set out the relevant passages below:

At page 160 of the Record he said:

> "I heard the evidence and I ruled that the statement was admissible and you were called back in and the statement was read to you. But, Mr. Foreman and members of the jury, bear in mind that my function is to rule on whether that statement ought not to be put before you. It does not relieve you of your responsibility of deciding amongst yourselves whether or not that statement or confession was free and voluntary.
>
> So, when you come to retire, you will have the statement with you if you wish and you decide first of all whether it was free and voluntary and secondly if the answer to that is yes, it was, then you decide amongst yourselves what does it mean. Well, you have to decide. It speaks for itself. It is in effect saying that the accused man is admitting that he was out Long Road; he tried to rob the deceased, the deceased put up a fight, tripped and fell and he used a stone hit him in his head; took money from his pocket; took money from his cap or hat; and he is therefore admitting responsibility for the crime, so you wouldn't have much difficulty in deciding what it means. Thirdly, you have to decide what weight or value you attach to the statement. Well, if you decide that it was free and voluntary and if you decide that it means what it says, then you won't have much difficulty in deciding what weight and value you attach to it, and that is the main thrust of the case for the prosecution."

At page 168 of the Record he said:

> "The next witness for the prosecution was Detective Joslyn Bailey. Now, his evidence can be regarded as crucial because it is on his evidence that you are asked to consider the acceptability or otherwise of the caution statement which is crucial to this case."

Then at page 169 he said further:

> "The witness went on to say that he asked two questions afterwards in order to clear up something and those questions and the answers to them form a part of the caution statement. He said not only did the accused sign it but the Justice of the Peace sign and he Inspector signed the statement and prior to taking it he read over the words of a caution to the accused man and he had the accused man sign that. Of course, there is sharp conflict here because the

> "evidence of the accused is that a gun was available or was visible on the table and that the Inspector stamped his feet and thumped the desk with his fist and used the handle of the gun to knock the desk. This is categorically denied by the Inspector and it is for you to deal with it in accordance with my directions on the question of freeness and voluntariness of the statement."

Finally at page 176 he directed:

> "Well, I have already dealt with the evidence or the cross-examination of Inspector Bailey on that subject, when it was suggested to Bailey that he it was that had come and taken him out of the cell. You might wish to ask yourselves 'How would he know that it was Corporal Riley who was calling him, when in his position, lying down in the cell, he would not have been able to discern who was calling if anyone was calling from outside.' Anyway, he said that he saw Mr. Riley in the passage and the person took him, handed him over to Riley and he was taken to the CIB office where he felt coward. He said he was coward, he was put on the ground to sit and he saw Mr. Bailey in the office and Mr. Bailey asked him if it was me kill the man, stamped his feet, hit the desk with the gun handle. All these are aspects which you could properly consider in relation to whether or not the statement was voluntary if you accept them as being true. It's all an issue of fact which you are to determine."

Nowhere in these passages did the learned trial judge alert the jury to the fact that the appellant was saying he did not make the statement which was attributed to him and therefore the jury should determine at the outset whether or not he did not make the exhibited statement. By failing to remind the jury that the defence was contending that the appellant was put in fear by the same police officer who, on the defence account, had shot the appellant a few days earlier and who now issued an implied threat to shoot the appellant, the learned trial judge did not fairly described the circumstances which the appellant said made him fearful and so failed to put before the jury the full ambit of the defence in relation to the caution statement. The learned trial judge indicated at page 169 of the Record that he had given the jury "directions on the question of freeness and voluntariness of the statement" and that the jury should act in accordance with those

directions. In fact he had given no such directions.

Mr. Cooke drew our attention to a discrepancy in the evidence of the prosecution in that the Justice of the Peace did not testify to having heard the caution read to the appellant and he suggested that this omission could in some way affect the credibility of the other prosecution witnesses as to the taking of the caution statement. Indeed this factor was not highlighted before the jury as also other aspects of her evidence dealing with the position of the appellant in the room when she attended at the Police Station.

The prosecution relied upon the caution statement to such an extent that it was categorised as "crucial" by the learned trial judge. Having regard to the unsatisfactory treatment of this aspect of the case by the learned trial judge, we are of the view that there is merit in Ground 4 of the additional Grounds of Appeal which complained that:

> "The Learned Trial Judge erred in that he did not adequately assist the jury in his directions pertaining to the caution statement."

Mr. Cooke frankly suggested that a finding in favour of the appellant on Ground 4 could only lead to a new trial and we are in complete agreement with that position. We are of the view that this application should be treated as the hearing of the appeal, that the appeal should be allowed, the conviction quashed and the sentence set aside, but we consider that in the interests of justice a new trial should be ordered to take place in the next session of the Portland Circuit Court.