J A M A I C A.

26th September, 1963

IN THE COURT OF APPEAL, JAMAICA
CRIMINAL APPEAL NO. 85/63

Before: The Hon. Mr. Justice Cundall (President)
The Hon. Mr. Justice Lewis
The Hon. Mr. Justice Duffus.

R E G I N A V. GLADSTONE IRWIN.

Mr. E.E. Gayle for the Appellant
Mr. L. Barnett for the Crown

MR. JUSTICE DUFFUS:

The applicant seeks leave to appeal against his conviction for the murder of Anita Hayden. The Crown's case was that Anita Hayden, an old woman of 78 years, was brutally chopped to death by the applicant on the 21st of January this year. There were no eye-witnesses to the crime and the Crown's case was founded on circumstantial evidence and evidence of oral statements made by the accused from which a confession of guilt could be inferred, The applicant did not give evidence nor did he made any statement from the dock, and no witnesses were called on his behalf before the jury.

The facts as told by the witnesses for the crown were that the applicant and the deceased lived in separate homes three chains apart in thedistrict of Aboukir in the mountains of St. Ann. The houses were separated by what was picturesquely described by a witness as "hill and gully". There were separate tracks leading from each home which merged into a common track leading to a public road. The applicant and the deceased were not on good terms; they had frequent quarrels, the last of which any evidence was given was on the 17th of January, and it was with regard to water which the applicant had taken from the deceased's drum.

During the morning of the 21st. January, Gloria Peterkin, who lived in the same home with the applicant, saw him leave the yard, taking his cutlass with him. Sometime later that morning the horribly mutilated body of Anita Hayden was found on the track leading from the applicant's yard. Zepheniah Thomas, brother of the deceased woman, lived in the same home with her, and on the morning of the 21st he saw her leave the house and go down the track. About five minutes later he

heard sounds of chopping coming from the direction in which his sister had gone, but as these sounds came from a portion of the track which was behind a rock and bushes he did not see who was doing the chopping nor what was being chopped. As is usual in remote country districts, these two witnesses were unable to give any accurate [illegible] evidence as to time, but it seems clear that the applicant and the deceased left their respective homes within a short time of each other toward the common track leading to the main road. Some two hours later Zepheniah saw his sister's body lying by the junction of the two tracks. A report was made to the police and a search was made for the applicant who had vanished from the district. The applicant was found next morning at Bunker's Hill approximately eleven miles from Aboukir. He was taken by the police to the police station at Cave Valley.

On the way to the station Sergeant Witter asked him where was his machete and the applicant said that it was at Aboukir. The Sergeant then asked him "What part of Aboukir?" and the applicant replied that "it was going from the main road up to his house by the track, and that he threw it to the right of his house." Up to this stage the applicant had not been formally arrested or charged and no caution had been administered to him. The Sergeant proceeded to Aboukir and found the machete at the place described by the applicant. The blade had bloodstains on both sides. He took it to the Cave Valley police station where Detective Corporal Robinson showed it to the applicant and asked him if it was his machete. To this enquiry the applicant said, "Yes, sir, I get myself in trouble, make me tell you."

At the trial Corporal Robinson and Detective Constable Gayle deponed that prior to Corporal Robinson enquiring as to whether the cutlass was the applicant's that Robinson had cautioned him. Sergeant Witter stated that no caution was given. All three police witnesses however agreed that the applicant was cautioned before Corporal Robinson proceeded to make a written statement from him. After the written statement had been signed the applicant was formally arrested and charged for murder.

Subsequent analysis of the bloodstains on the applicant's cutlass showed that it was human blood of the same grouping as the deceased woman's blood - group AB - which was the rarest type among the four main groups in Jamaica, being only 3.2 per cent in frequency.

Apart from the applicant's admission that the cutlass was his, it was identified by two witnesses who had borrowed it from him and used it on many occasions.

Learned counsel for the applicant objected to the admission in evidence of the oral and written statements. The Judge then proceeded to hear evidence and submissions from counsel in the absence of the jury, after which he ruled that the oral statements should be admitted as he was satisfied that these statements were voluntary and had not been made by reason of any threat or inducement to the applicant. He, however, declined to admit the written statement as, although he was satisfied that it was also made without any threat or inducement, he took the view, derived from the context of the document itself, that questions had been asked during the course of the taking of the statement in order to illicit the sort of information it contained.

On the hearing of this application a number of grounds were put forward, but with one exception these were devoid of any real merit. The only question which gave us serious concern was 'had the learned judge exercised his discretion correctly or at all when he decided to admit in evidence the oral statements made by the applicant in answer to questions put to him when he was obviously detained in custody by the police?' These oral admissions must undoubtedly have been given great weight by the jury. Quite clearly, when Sergeant Witter asked the questions which elicited the information leading to the finding of the murder weapon the applicant was not cautioned, and this was in breach of Rule 3 of the Judge's Rules, which is as follows:

> Rule 3: Persons in custody should not be questioned without the usual caution being first administered."

As has been pointed out time and again the Judge's Rules are not rules of law, but only rules for the guidance of the police; therefore the fact that a prisoner's statement is made by him in reply to a question put to him by a police constable after he had been taken in custody without the usual caution being first administered, does not of itself render the statement inadmissible in evidence. The practice has, however, been strongly condemned. It is always within the discretion of the judge to exclude a statement obtained in such circumstances and an appellate court when reviewing the matter should be satisfied not only that the judge has in fact considered the question and applied his discretion but that he has done so on correct premises, not on some mistaken view of the facts or the law.

The law on this subject is set out quite succinctly by Byrne, J. in R. v. Bass (1953), 1 A.E.R., 1064, commencing at page 1065, and here I quote -

> "There can be no doubt, having regard to that evidence that the appellant was in custody, that he was questioned without being cautioned, and thus, that there was a breach of Rule 3 of the Judge's Rules. If the Deputy Chairman had held, as we think he should have done, that the statement was taken in contravention of the Judge's Rules, it would have been open to him in his discretion to have refused to admit it. On this matter he did not exercise any discretion because, erroneously as we think, he considered the rules had not been contravened. That however, is not an end of the matter, for this court has said on many occasions that the Judge's Rules have not the force of law, but are administrative directions for the guidance of the police authorities. That means that, if the rules are not complied with, the presiding judge may reject evidence obtained in contravention of them. If, however, as R.v. Voisin

shows, a statement is obtained in contravention of the Judge's Rules it may, nevertheless be admitted in evidence provided it was made voluntarily. The principle to be applied was laid down in R. v. Thompson, as approved in Ibrahim v. R. In the latter case Lord Sumner said,

'It has long been established as a positive rule of English criminal law that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement, that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority. The principle is as old as Lord Hale.'

"It is to be observed, " continued Byrne, J., "as this court pointed out in R. v. Murray, that while it is for the presiding Judge to rule whether a statement is admissible, it is for the jury to determine the weight to be given to it if he admits it, and thus, when a statement has been admitted by the Judge, he should direct the jury to apply to their consideration of it the principle as stated by Lord Sumner, and he should further tell them if they are not satisfied that it was made voluntarily they should give it no weight at all and disregard it."

Our difficulty here arises from that part of the Judge's ruling which reads -

"And I am satisfied that there was no impropriety in the questions put by the police to the accused, and I rule that the answers he gave to those questions are admissible <u>in law</u>."

And I place particular emphasis on the last two words - "in law" - used by the learned trial Judge. It is a pity that the learned Judge was so sparing of words when delivering his ruling on a matter which occupied nearly three days in the taking of evidence and the hearing of arguments, and which took up 87 pages of the transcript. The Judge found that there was no evidence whatever to substantiate

the suggestions put forward by learned counsel for the defence that the police had used threats and offered inducement. The Judge has not however said in so many words that there had been a breach of the the Judge's rules, but notwithstanding, he in the exercise of his discretion, had decided that the evidence should be admitted.

After a great deal of anxious thought on our part we have arrived at the conclusion that he must have exercised his discretion on the proper grounds, having regard -

(i) to the lengthy arguments before him on the very points involved;

(ii) to his statement that, "I have gone into the authorities, particularly the case of Ibrahim v. R. (1914) Appeal Cases" (a leading case to which he had been referred by counsel for the Crown who was quoting from the Judgment of Lawrence J. in R. v. Voison, 13 Cr. App. R., 89, on the matter of the exercise of the judge's discretion.);

(iii) in the course of his summing-up, which took place not long after his ruling, he said, "And now we pass to the question asked by Sgt. Witter of the accused. You will remember that I told you that the District Constable at Bunker's Hill to bring the accused to him and he was placed in the police vehicle. If a person is under restraint, if a person is not free to go as he pleases, then so far as the law is concerned he is in custody."

And(iv) the fact that he had excluded the written statement on the grounds which I have mentioned earlier, which showed quite clearly that he excluded it because of the exercise of his discretion.

As I say, we are satisfied that he did in fact exercise his discretion when he decided that the oral statements should be admitted, but even if he had not done so there can be no doubt that he left to the jury quite unequivocally the issue as to whether or not these oral statements were in fact made voluntarily, and as there was not a shred of evidence of any inducement or promise or threat held out to the prisoner, the jury could not possibly have arrived at any other conclusion but that the statements were voluntary. Furthermore, the Judge clearly told the jury that the weight to be attached to the statements was a matter for them and he also told them - and again I quote from his summing-up - "that he had no doubt that they would attach greater weight to a statement made after caution than they would to a statement made by a person who had not been cautioned and thereby put on his guard."

I turn now to the other oral statement of the applicant, admitting ownership of the machete. When the bloodstained machete was

shown to the prisoner and he was asked by Corporal Robinson if it was his, there was contradictory evidence from the police witnesses as to whether or not he was in fact cautioned, but this issue was again left to the jury. It has been submitted to us that this question should not have been asked by Corporal Robinson as it was in the nature of cross-examination designed to trap, but we do not agree. We consider that it was a perfectly fair and proper question in view of the information given by the prisoner earlier that day which had led to the finding of the machete. If, in fact, the machete produced at the station was not the prisoner's he was given the opportunity of saying so. It was entirely a matter for him whether he owned it or disowned it. No injustice was done by asking this question. There was no invitation to the prisoner to make a further statement that he had "got himself in trouble". This was clearly volunteered by the prisoner and cannot be said to be a necessary answer whether the cutlass was his.

Now, before parting from the summing-up, we observed a somewhat unfortunate remark by the learned Judge in an otherwise excellent summing-up, which did not accurately set forth the law, and that occurs in the following passage which appears on page 130: -

> "No suggestion has been made that there was any threat to the accused nor any inducement held out to him nor any promise made to him, and you must be satisfied that anything which he did say was not coloured by any of these considerations - threats inducements or promises - because if they were then it is entirely a matter for you, but that evidence could have but little weight."

What he should have said was that if they found there had been threats or inducements which had operated upon the mind of the prisoner, that the statement could not then be regarded as voluntary and should be rejected in its entirety as it carried no weight whatever, and I refer to R.v. Thompson (1893), 2 Q.B.D., 12. The Judge, however, does go on to deal with the matter of weight in terms which are clear and specifically applicable here. No fault whatever can be found with his further

directions and it is possible that the unfortunate statement was used inadvertently. No injustice could have resulted, for, as I have said before, there was no evidence whatever from which inducements or threats could have been inferred.

It is for these reasons that we have decided to refuse leave to the applicant in this matter. The application is refused.

/Sgd./ H.G.H. Duffus,
Judge of Appeal.