JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 111/83

BEFORE: The Hon. Mr. Justice Kerr, J.A.
The Hon. Mr. Justice Rowe, J.A.
The Hon. Mr. Justice Ross, J.A.

R. v. HEMSLEY RICKETTS

Miss J. Nosworthy for the applicant

Mr. C. Lawrence for the Crown

December 19, 20, 1984 & May 9, 1985

ROSS, J.A.

On December 20, 1984, we treated the application for leave to appeal as the hearing of the appeal, dismissed the appeal and affirmed the conviction. At the time we said that we would give our reasons in writing. This we now do.

The applicant, Hemsley Ricketts, was convicted in the Hanover Circuit Court on November 1, 1983, of the murder of Clifton Campbell.

The prosecution's case may best be described by reference to the evidence of the principal witnesses. Edroy McKenzie testified that at about 10.00 p.m. on March 9, 1983, he was at the crossroads at Logwood in the parish of Hanover. While there he saw the deceased and two other men sitting on a window of a burnt out building. The applicant went up to where the three men were and there was a fight between the applicant and the deceased. The deceased then ran off passing the witness, and going in the direction of his home. He was followed by the applicant, and the other two men followed the applicant. All four men went out of sight and a couple of minutes later the witness heard "bawling" coming from the direction of the deceased's home. McKenzie went to the deceased's home where he saw the deceased lying on the

verandah bleeding from wounds to his forehead and left hand. The deceased was later taken in a car to the Savanna-la-mar hospital.

Dr. Carlton Jones, a medical practitioner, performed a post mortem examination on the body of the deceased on March 12, 1983, and he found externally:

(1) blood all over the deceased clothing;

(2) a compound fracture of the frontal bone of the skull injuring the brain;

(3) a 2 inch laceration at the left side of the neck;

(4) a 6 inch by 2 inch cut on the left shoulder joint causing the muscles of the shoulder joint to be exposed and a big vein in the shoulder to be cut;

(5) a 5 inch by 2 inch cut at the back of the right arm;

(6) a cut on the inside of the left wrist;

(7) a 5 inch by 3 inch cut on the right wrist;

(8) a 4 inch by 1½ inch cut on the back of the right thigh.

Dr. Jones testified that these injuries were consistent with infliction by a sharp instrument, such as a machete, and that great force would have been necessary to cause the injuries found; in his opinion death was due to shock and haemorrhage due to the cerebral laceration and the laceration to the big artery and vein in the shoulder, and death would have occurred within half an hour of the infliction of the injuries.

Detective Corporal Blake who investigated the case related that after receiving a report he went to the scene and saw a trail of bloodstains from the crossroads at Logwood along the road to the verandah of the deceased's house; at the Green Island Police Station he saw the applicant and told him that he had received information that he had chopped the deceased Campbell to death. The applicant said nothing. Det. Cpl. Blake then arrested the applicant, charged him with the offence of murder and cautioned him, whereupon the applicant said:

> "Mr. Blake, the man them thief me herb and me go ask them about it and tell him fi give me back some, and he put up bad man strain to me and me couldn't do nothing more than chop him sah."

In his defence the applicant made an unsworn statement in which he told the court and jury that he saw the deceased at the crossroads speaking to some people, that the deceased told him, "me hear say you got it a tell people say me tief you herb and mek people a tek it talk say all a we live in the whole district a plant and me tief it." The applicant replied, "if you know say you tief mi herb give me back some out deh, if a even a little." The deceased then said, "me not giving you back any so you must leave," and immediately started to chop the applicant with a machete. A fight followed between the two men in the course of which the applicant received three cuts, after which he took the machete from the deceased and ran away followed by the deceased and others. The applicant went on to say that he ran to the police station, reported the incident and was told to return the following day for a paper to attend the hospital; on the following day he returned to the station where he received the paper and went to the hospital where he was treated, after which he returned to the Green Island Police Station where he was detained.

The applicant denied telling Det. Cpl. Blake the words attributed to him and stated that he only said:

> "me did have a little herb, sir, and the man take it away, sir, and me ask him fi give me a little out of it and him chop me, sir, and me get away from him and come at the station."

Miss Nosworthy was given leave to argue several additional grounds of appeal filed on December 5, 1984. The first of these grounds was:

"1 (a) The learned trial judge misdirected himself when he wrongfully admitted in evidence before the jury the oral statement allegedly made by the appellant (sic) to the crown witness Detective Corporal Llewellyn Blake without determination of the voir dire on issue of the voluntariness of the said oral statement.

(b) That a miscarriage of justice was committed when the learned trial judge in purporting to exercise his discretion whether or not to permit the appellant (sic) to give evidence on the voir dire the learned trial judge refused the appellant's (sic) application to be heard on the issue."

The oral statement referred to has already been set out. Defence counsel, Mr. Frater, at the trial objected to the admission in evidence of this statement and asked that the learned trial judge conduct an inquiry in the absence of the jury on the voir dire to determine whether or not it is admissible; the court was also informed by defence counsel that he had been instructed that the applicant had not spoken the words in question.

During the course of the inquiry, after the witness had testified that the statement was voluntary Mr. Frater cross-examined the witness as to what was said or done at the time when the statement objected to was allegedly made. He suggested to Det. Cpl. Blake that he had questioned and behaved in a "menacing fashion" to the applicant at the time, and Blake denied either questioning the applicant or behaving in a menacing fashion to him. There was no suggestion of any violence or inducement by the witness towards the applicant and the other questions put to the witness suggested that the words had not been spoken by the applicant but that instead a completely different statement had been made by the applicant; this was denied by the witness.

During the cross-examination of Det. Cpl. Blake the learned trial judge reminded Mr. Frater that:

> "We are here to enquire into the admissibility of a certain statement, and for that purpose enquire whether it was free and voluntarily given. You should keep that in mind."

Despite this reminder the only questions put to the witness to suggest that the statement was not voluntary were those referred to earlier suggesting that the witness behaved in a menacing fashion.

At the end of Mr. Frater's cross-examination of Det. Cpl. Blake the learned trial judge terminated the enquiry without giving the applicant the opportunity of giving evidence in the enquiry on the voir dire and ruled that the statement was admissible in evidence. It seems to us that the learned trial judge was of the view that the question of the voluntariness of the statement had not been challenged in cross-examination and this being so, there was no need for an enquiry, as the issue raised was a question of fact for the jury as to whether or not the words had been spoken by the applicant to the witness.

In the recent case of Ajohda v. The State (1981) 2 A.E.R. 193 before the Privy Council this issue was dealt with exhaustively. It is not necessary to outline the facts of that case, but to go directly to p. 201 of the judgment of Lord Bridge where he said:

> "It may be helpful if their Lordships indicate their understanding of the principles applicable by considering how the question should be resolved in four typical situations most likely to be encountered in practice:
>
> 1. The accused admits making the statement (orally or in writing) but raises the issue that it was not voluntary. This is a simple case where the judge must rule on admissibility, and, if he admits the evidence of the statement, leave to the jury all questions as to its value and weight.

" 2. The accused, as in each of the instant appeals, denies authorship of the written statement but claims that he signed it involuntarily. Again, for the reasons explained the judge must rule on admissibility, and, if he admits the statement, leave all issues of fact as to the circumstances of the making and signing of the statement for the jury to consider and evaluate.

3. The evidence tendered or proposed to be tendered by the prosecution itself indicates that the circumstances in which the statement was taken could arguably lead to the conclusion that the statement was obtained by fear of prejudice or hope of advantage excited or held out by a person in authority. In this case, irrespective of any challenge to the prosecution evidence by the defence, it will be for the judge to rule, assuming the prosecution evidence to be true, whether it proves the statement to have been made voluntarily.

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...."

As there seems to be some confusion in the minds of some attorneys-at-law as to the question of admissibility of statements made by accused persons, we hope that the clear statement of the law above will be of assistance.

The instant case is within the fourth category as there was no evidence capable of suggesting that the statement was other than voluntary and the defence was an absolute denial of the evidence of the prosecution. This being so, no issue as to voluntariness arose and therefore no question of admissibility fell to be considered by the judge. As soon as it became clear at the end of the cross-examination that no issue of voluntariness was being raised by the defence the learned trial judge quite rightly terminated the inquiry and admitted the statement in evidence for the consideration of the jury as to whether or not the statement was made by the appellant and how much weight should be given to it.

The first ground of appeal therefore failed.

The second ground of appeal is that:

> "the learned trial judge erred in law when he misdirected the jury as to the role and function concerning the evidence of the aforesaid oral statement made to Detective Corporal Llewellyn Blake by the appellant."

Looking at this ground it is not quite clear as to exactly what was the complaint but from the submissions made in regard thereto it would seem that the complaint is that the learned trial judge directed the jury to consider whether the statement was free and voluntary, as it was submitted that in doing so the judge sought to get the jury to perform his function in determining the issue of voluntariness.

In the course of his summing-up at p. 71 the learned trial judge said:

> "Now the statement that I admitted in evidence and which was put before you by Det. Cpl. Blake, and which I have just read to you, you having heard it, you must decide first of all whether or not that statement was given. If the answer to that question is yes, it was made, then you decide amongst yourselves was it a free and voluntary statement. If the answer to that is no (?), then you ask yourselves what does it mean. I believe that you will have no difficulty in determining what it means, it is a

> "straight-forward statement. And then finally, you have to decide what weight, what value you attach to it. If you accept that it was made by the accused person freely and voluntarily then it would amount in law to what is known as a confession."

It is instructive to look again at the Ajohda case. At p. 201 Lord Bridge said:

> "It has to be remembered that the rule requiring the judge to be satisfied that an incriminating statement by the accused was given voluntarily before deciding that it is admissible in evidence is anomalous in that it puts the judge in a position where he must make his own findings of fact and thus creates an inevitable overlap between the fact-finding functions of judge and jury. In a simple case, where the sole issue is whether the statement, admittedly made by the accused, was voluntary or not, it is a common place that the judge first decides that issue himself, having heard evidence on the voir dire, normally in the absence of the jury. If he rules in favour of admissibility, the jury will then normally hear exactly the same evidence and decide essentially the same issue albeit not as a test of admissibility but as a criterion of the weight and value, if any, of the statement as evidence of the guilt of the accused."

If we bear in mind that all questions of fact are to be determined by the jury, then when the judge decides whether or not the statement is voluntary in order to determine admissibility, that is not the end of the matter, as the jury in its deliberations has to decide how much weight is to be given to the statement, and to do this it must consider whether the statement is a voluntary one. Let us not forget that when it comes to the facts the jury is not obliged to accept the views of anyone on the facts. It is not inconceivable that a judge could find a statement to be voluntary and admit it in evidence, but that a jury, having heard the same evidence of the circumstances, give no weight whatever to the statement.

In our view the directions were proper and adequate.

The third ground of appeal is that:

"The learned trial judge misdirected the jury on the law relating to circumstantial evidence and more particularly the underlisted proven facts thereby misleading the jury and conveying the impression to them that such evidence satisfied the test of circumstantial evidence and being therefore capable of proving the guilt of the appellant:

(a) the fact that the appellant was a farmer and that no machete was found at his house after a search was made thereof;

(b) that a trail of blood led from the crossroads to the deceased's house;

(c) that the sound of bawling was heard coming from the direction of the deceased's house after the incident at the crossroads;

(d) that the deceased ran off and the appellant ran behind him."

In his summing up the learned trial judge at pp. 66-67 gave a general direction to the jury on circumstantial evidence and explained its nature to them. Having done that, he reviewed the evidence and mentioned particular bits of circumstantial evidence which the jury could consider in deciding whether the prosecution had proved its case. Among these were:

(1) the fight between the deceased and the applicant,

(2) the deceased running away towards his house followed by the applicant,

(3) the sound of bawling coming from the direction of deceased's house about two minutes after he ran off,

(4) the trail of blood from the vicinity of the crossroads along the road to deceased's house,

(5) the absence of a machete at the home of the applicant, a farmer,

(6) the several serious injuries inflicted on the deceased,

(7) the statement made by the applicant to Detective Corporal Blake on the day after the incident.

Miss Nosworthy submitted that the directions given fell short of the direction in the formula laid down in R. v. Hodge (1838) 2 Lew. C.C. 27, which was approved and applied by the Court of Appeal in R. v. Cecil Bailey 13 J.L.R. 46, where Edun J.A. said at p. 48:

> "The trial judge did not direct the jury along the lines of the time honoured formula used in reference to circumstantial evidence. That is: 'they (the jury) must decide not whether these facts are consistent with the prisoner's guilt, but whether they are inconsistent with any other rational conclusion, for it is only on this last hypothesis that they can safely convict the accused."

Edun J.A. at p. 50 went on to say:

> "We are also of the view that the rule in Hodge's case had, in Jamaica, become a settled rule of practice and it is incumbent upon a trial judge to assist the jury in their proper line of approach having regard to the facts and circumstances of the particular case. But a judge's failure to do so may not necessarily in every case result in the quashing of a conviction. In the instant case, the trial judge failed to give the jury assistance in accordance with the rule in Hodge's case. However, the facts in this case are not purely circumstantial; they consist partly of circumstantial evidence and partly of the statements the applicant made to the police."

It is clear from Bailey's case (above) that the failure to use the formula in Hodge's case is not necessarily fatal in a case where the evidence is mainly circumstantial.

In the instant case the learned trial judge did not direct the jury following the rule in Hodge's case although he did explain adequately what is meant by circumstantial evidence and how the jury should deal with it. Further, in this case, as in Bailey's case, the evidence was not purely circumstantial as in addition to the circumstantial evidence the applicant had made a statement to the police which was in evidence and could be described as a confession.

In the light of the above it cannot be said that there was a misdirection of the jury and so this ground, too, failed.

Ground 4 complained that the learned trial judge had erred in law when he failed to leave the defence of accident to the jury, but it was, quite rightly, abandoned by counsel, as it would be rather difficult to conceive of any circumstances in which the injuries described by Dr. Jones could have been inflicted accidentally.

Ground 5 is that the learned trial judge erred in law when he failed to leave the defence of self-defence to the jury.

Before self-defence can be left to the jury, there must be evidence either from the Prosecution or defence to raise the issue. In the instant case, there was no such evidence because on the case for the Crown, there was a fight between the deceased and the applicant after which the deceased ran away and was chased and chopped to death by the applicant, while on the case for the defence, there was a fight between the applicant and the deceased, in the course of which the deceased used a machete to cut the applicant who took away the machete and ran away to the police station where he reported the incident; there is not a word from the defence to suggest that the applicant retaliated when he was cut by the deceased; nor would the issue arise even if it were the case that the applicant took away the machete from the deceased and then proceeded to inflict seven wounds on the deceased - having disarmed the deceased, how could he say that he was acting in self-defence?

Accordingly, there was no basis on which the learned trial judge could properly have left the issue of self-defence to the jury, and so ground 5 also failed.

For the above reasons the application for leave to appeal was treated as the hearing of the appeal, the appeal was dismissed and the conviction affirmed.