Judgment Book

635

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 92/81

BEFORE: The Hon. Mr. Justice Carberry, J.A.
The Hon. Mr. Justice Carey, J.A.
The Hon. Mr. Justice Campbell, J.A. (Ag.)

R. v. MAURICE FREEBOURNE

Richard Small for Appellant

Miss Hyacinth Walker for Crown

March 25, 26 & July 16, 1982

CAREY J.A.

On the 26th March, 1982, having treated the application for leave to appeal as the hearing of the appeal, we dismissed the appeal as to conviction and allowed the appeal as to sentence which we varied to concurrent terms of imprisonment at hard labour for 10 years. We promised then to put our reasons in writing. We now do so.

The appellant was convicted in the Westmoreland Circuit Court on 2nd June 1981 on counts of assault with intent to rob and shooting with intent and sentenced to 15 years imprisonment at hard labour on each of these counts.

The facts in this case can be shortly stated. The appellant was a police constable stationed at the Savanna-la-mar police station. On 16th June, 1980 he was dispatched for duty in Savanna-la-mar and a firearm and 12 rounds of ammunition issued to him. On the following day the appellant it is alleged used the firearm in an attempt to rob a farmer named Allan McLean of ganja and money at a remote district in Westmoreland called Bird Mountain. At the time of the crime one Reginald Clarke a neighbour alerted by McLean's shouts for help, responded. The appellant fired at Clarke, the shot finding its mark in his shirt, br

burning a hole through it. In escaping from this scene and the crowd that gathered, the accused lost his hat, but it was retrieved and handed over to the Whithorn police to whom a report was made. When the appellant returned to the police station at Savanna-la-mar, he handed over the firearm and 12 rounds, substituting for the spent round a live round of a different calibre from the rest. At the police interview with the appellant held during investigation of this incident, he is alleged to have made a statement at the end of which certain questions were put to him to clear up ambiguities without the benefit of any caution being administered. The admission in evidence of these questions and the answers thereto form the basis of the main ground of appeal.

The appellant testified that after he went on duty in Savanna-la-mar he learnt that his mother was ill, and set off to Lucea where she lived. On the return journey, he travelled via Bird Mountain which he admitted was a longer route. He came upon two men throwing what appeared to be ganja from one container into another. He identified himself as a police officer and arrested both men for possession of ganja. A crowd gathered and stones, sticks and bottles were thrown. The witness Clarke who was one of the two men arrested (the other being McLean) left the scene but returned with a machete, which he raised to attack him. He was told to halt but advanced in spite of the order. In these circumstances states the appellant he fired, then ran for his life.

The ground upon which counsel rested his arguments was "that the learned trial judge erred in law in admitting into evidence questions put by Detective Sergeant Gayle to the applicant and the answers thereto." Before detailing the three questions, it would be helpful to give a summary of the statement given to Detective Sergeant Gayle. This account, but for one variation, was substantially what the appellant related to the jury on oath. He said at the interview that while on enquiry in Savanna-la-mar he learnt of his mother's illness and left without permission. On his return journey he picked up two persons with whom he

travelled via Bird Mountain where he noticed two men pouring out what appeared to be ganja. He accosted them but an angry mob attacked him. In making his escape, he fired a single shot. One of his companions suggested that he seek assistance at the Whithorn police station but he demurred on the ground that he had been told not to leave his police area with a firearm. The variation was that while he mentioned in his evidence the fact of an attack by Clarke with a machete, he ommitted this detail in the statement to the police. No caution was administered before the following three questions were put to him, viz, -

> (i) "Had he made any official report of the matter in the station diary at Whithorn or elsewhere?"

The answer was no, because he was thinking of departmental trouble.

> (ii) "Did he know that the people were saying something different from what he was saying?"

His reply - yes, because at the identification parade he had heard one of the witnesses remark that he had come with a gun demanding all they had, but he had denied that allegation.

> (iii) "This related to a tam which it is alleged had fallen from the accused's head at Bird Mountain. He was shown this tam and asked if it was his."

His first response was a denial but the officer pressed by saying that he had seen him with such a beret frequently. The accused then admitted that it was his and had fallen off when he was attacked by the crowd and had no time to pick it up.

Mr. Small put his argument in this way. The special caution which the Judge's Rules directed to be administered had not been administered. Although the reason given for the further questions was to clear up ambiguities, none of the questions relate to any ambiguities in the statement. On that basis the learned trial judge should have exercised his discretion against admitting the answers in evidence. Learned counsel also singled out for particular comment the question

regarding the tam. In this instance, he said, Gayle had in his possession knowledge of ownership. The evidential effect of this question was to show the appellant as a liar.

It is clear from the arguments put forward by learned counsel that he did not suggest in any shape or form that the answers given in response to the questions put, were other than voluntary. The burden of the submission was the complaint that the learned trial judge did not address his mind to the prejudicial effect of this evidence which outweighed its probative value. He cited R. v. Male & Cooper (1980) 17 Cox 689 and called attention to the following words of Cave J. in giving a ruling on the admissibility of a certain statement by one of the appellants to a police officer:-

> "It is no business of a policeman to put questions which may lead a prisoner to give answers on the spur of the moment, thinking perhaps he may get himself out of a difficulty by telling lies."

Learned counsel correctly pointed out that before the 3 questions were put to the appellant, no caution had been administered. Rule 3 (b) of the Judge's Rules provides as follows:

> "It is only in exceptional cases that questions relating to the offence should be put to the accused person after he has been charged or informed that he may be prosecuted. Such questions may be put where they are necessary for the purpose of preventing or minimising harm or loss to some other person or to the public or for clearing up an ambiguity in a previous answer or statement. Before any such questions are put, the accused should be cautioned..... "

It is plain that the reason put forward by the police officer for posing the questions, was not to clear up ambiguities. The first question sought an answer to the question whether an official report had been made in the station diary at Whithorn police station. The appellant had stated that he had not gone to that police station. There could not be any doubt but that no entry in a diary could have been made. The second related to the state of knowledge of the appellant as to the

allegations being made against him. Again his knowledge or ignorance of the allegations of others created no uncertainty as to what he was saying. The third question did not arise from anything the appellant had said in his statement, and was designed to seek information whether the appellant was present on the scene by linking him to a tam which fell from his head in the course of the incident at Bird Mountain.

In the result, it was plain that a caution had not been administered as was required and there were no ambiguities which required clarification. We would point out however that at the time the questions were put, the appellant had neither been charged nor informed that he would be prosecuted. In order to meet this objection Mr. Small referred to the words set out above from R. v. Male & Cooper (supra). But we do not wish to rest our decision on that narrow basis for learned counsel was not unmindful of that flaw in his argument. So he rested his submissions rather on the basis that the learned trial judge had not applied his mind to the prejudicial effect of that evidence vis a vis its probative value when the former outweighed the latter. Even had we accepted that there had been a breach of the Judge's Rules, we would have been constrained to say that such statements, provided they are voluntary, are not inadmissible as a matter of law. Such a breach does not lead to an automatic ruling of inadmissibility; the judge retains a discretion to refuse to admit in circumstances where he considers the evidence was unfairly obtained even if there were no breach of the rules. If authority is required for this proposition, we would refer to R. v. Prager (1972) 1 All E.R. 114 where the headnote correctly as we think, confirms our view of the law. It was stated there that:

> "The Judge's Rules 1964 are not rules of law and their non-observance will not necessarily lead to a confession being excluded from evidence, unless it is shown that the confession was not made voluntarily. Accordingly where it is alleged that a confession has been obtained in the course of questioning which was not introduced by a caution in accordance with r 2b of the 1964 rules it is open to the trial judge to admit the confession on the basis that it was made voluntarily without ruling on the question whether it was obtained in breach of the rules.

It was then said that the evidence having been admitted, there was no direction given as to the jury's approach to this evidence, in particular to the fact that the appellant had lied regarding ownership of the tam. During the course of re-examination the appellant had admitted that Gayle's evidence was truthful and that he was not trying to cover up anything. Then the learned trial judge went on to say this at p. 29 of the summing up:-

> "But you will remember - if you accept Detective Sergeant Gayle's evidence - when he presented him with the tam he said it was not his, and it was only after Gayle said he had seen him wearing tam all the time, he said, 'let me tell you the truth, it is my own'. Bear in mind it is not for him to prove or disprove, it is for the crown to prove."

The learned trial judge did point out properly that the appellant had admitted lying but indicated that there was no onus on the appellant but on the crown to establish guilt. It was quite inaccurate to say that no direction had been given. The direction given was, we think, unexceptionable and eminently fair to the appellant.

Learned counsel also approached the matter on the basis of the prejudicial effect of the evidence. We do not think there is any merit in this point. As to the first question relating to the making of an official report in the station diary, the appellant himself gave evidence that he had made no report at the station because he was not supposed to leave his area without authorization. The question whether

he knew that his victims were giving a version altogether at variance with his, we would hardly consider as prejudicial. As to his lying about ownership of the hat, its probative effective would be suggest a guilty mind, or a person with something to hide. The significance of the appellant telling lies would also be to render him an unreliable witness. But the learned trial judge had properly and correctly indicated to the jury their approach to the lies of the appellant. In the result, we do not agree that it has been shown that the prejudicial effect outweighed the probative value of the evidence in relation to the answers given to the three questions put. The learned trial judge in our view exercised his discretion correctly in allowing the evidence to go to the jury with the directions he gave to them.

Having given the matter our most careful consideration, we were clearly of opinion that there was no merit in this ground and the appeal against conviction was accordingly dismissed.

With respect to the question of sentence, it was urged upon us that the sentences were manifestly excessive. The appellant had lost his pension rights it was said, but these, we understood, were negligible, the appellant's tenure of service being fortunately brief. We came to the conclusion, in agreement with the learned trial judge that the appellant should be treated no differently from a common criminal in the Gun Court. Since the present tariff for such offences in that court appears to be imprisonment at hard labour for 10 years, we reduced the sentences accordingly. We directed that the sentences run from 2nd September 1981.

In the result the appeal against sentence was allowed and sentences of 10 years at hard labour on each count substituted.