JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 65/88

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

R. vs. NICHOLAS HENRY

A.G. Cruickshank & N.D. Manley for applicant

Chester Stamp for Crown

February 13 & March 2, 1989

CAREY, J.A.:

After hearing submissions from Mr. Cruickshank for the applicant on the 13th February, we refused the application for leave to appeal and intimated that we would put our reasons in writing. In fulfilment of that promise, we now hand them down.

This applicant was convicted in the Circuit Court Division of the Gun Court on 17th March, 1988 of the murder of three police officers at the Olympic Gardens Police Station in St. Andrew before Morgan, J., and a jury and sentenced to death. He had been charged with one Wayne Smith known as "Sandokan" who also was convicted and sentenced, but who we understand had managed to break out of custody and was shot to death. His application for leave to appeal is no longer before us.

The incident in which the three police officers came to their deaths took place in the early morning of 19th November, 1986 when a number of men armed with guns attacked the Olympic Gardens Police Station. At that

time there were five officers on the station compound, two of whom were actually assigned duties, viz., Acting Corporal Ezra Cummings as station officer, Constable Derrick Levy as station guard. The remaining three were District Constable Archibald Robinson, Constable Raymond Thomas and one Constable Barrett or Bryant. There was a half hour bombardment of the station with automatic fire and molotov cocktails. Constable Levy took refuge in his barracks room where he remained until much later that day. Acting Corporal Cummings and Constable Thomas were found shot on the compound of the police station. District Constable Robinson was found inside the station by the C.I.B. office. He too had been shot. The evidence is silent regarding the fate of Constable Bryant. We must assume he survived. The evidence of these events was given by Constable Levy. Some of the wooden portions of the building, e.g., staircases, were burnt. The armoury had been broken and 2 M16 rifles, 2 sub-machine guns; 3 .38 revolvers and ammunition removed.

The Crown's case was projected on the footing that the applicant was an accessory before and after, to the murder of these three police officers. This was based on a statement taken under caution from the applicant, and evidence from a police officer who saw and spoke with the applicant on the night before the raid on the police station. Shortly stated, the applicant made the following admissions in his statement:

i. He knew the co-accused.

ii. On the night before the murder, he saw the co-accused and a number of other men all armed with automatic weapons and hand guns. He himself had a hand gun.

iii. The co-accused ordered one of the group (Flattice) to make some molotov cocktails (bombs). He assisted in this exercise.

iv. Constable Green arrived and enquired what was taking place. Bombs were in view and he must have seen the men with guns.

v. He told Constable Green that men were intending to attack them.

vi. The co-accused told him that he planned to kill certain named police officers and burn down the station.

vii. Later at 11:00 p.m., co-accused and 2 other men, armed with M16 rifle, KG 9 sub-machine gun, a hand gun and ammunition came to his home. One of the men carried molotov cocktails.

viii. The co-accused borrowed an old pair of trousers of his.

ix. The men set off intimating that they were bound for the Olympic Gardens Police Station.

x. At approximately 1:00 a.m., he heard the sound of gun shots from the direction of the police station.

xi. At 2:00 a.m., the raiders returned. They were now in possession of a large number of weapons than he had seen earlier.

xii. The co-accused told him they had shot up the Olympic Gardens Police Station and killed some police men.

xiii. He assisted in hiding a number of weapons some of which must have been stolen from the police armoury at the station.

xiv. With the help of one of the men, he hid guns at premises, 46 Penwood Crescent.

Constable Green testified that on the night before the massacre, he saw the applicant, the co-accused and others all armed with guns and molotov cocktails and enquired of the applicant, the purpose of this armament. The response was that men were stalking them. After the murder, when the police carried out a raid on his premises at 48 Penwood Crescent, where he was apprehended, a sub-machine gun was discovered. It is not altogether clear whether this was one of the stolen sub-machine guns. At all events, the theory was this would be one of the guns which the applicant had assisted in hiding on those premises.

The learned trial judge gave clear directions on the issue of whether the applicant was an accessory before the fact or a participant in the events of the police station. At page 484, she said this:

> "You will have to decide whether he is an accessory before the fact or whether he is a co-conspirator, in other words, a participant, in other words whether he went down to the station with the others, with the other men. If that is so, he would be part of the common design, or if he is an accessory before the fact because of what he

> "did - I will just explain to you. An accessory before the fact is one who though he is not present, in other words he is absent at the time when the felony is committed, he procured, counseled, commanded or abetted another or others to commit the felony. If that is so he is treated in all respects just like the principal offender, and becomes liable just like the principal offender, and that is why he is charged jointly for the capital charge."

She then went on to detail in clear and simple language the burden which was on the prosecution in that regard. She applied the law to the facts and at page 487 she reinforced her directions in this way:

> "What the Crown is saying is that what he did were positive acts of assistance, and he did them voluntarily, knowing at the time what they were going to do; knowing at the time that they were going to burn down the station; knowing at the time that they were going to kill policemen. You will have to decide on those facts whether or not he was an accessory before the act or (sic) whether he was a participant.
>
> Was he at the station that night? You have to look at the evidence that one of the firearms that was stolen from the station was found at his yard under a log or between the fence - the fence between both houses under a log. It is for you to say whether these can be used as a inference that he was at the station. It is a matter for you."

No challenge has been mounted in relation to her directions in this regard and we do not think they can be faulted.

In his defence, the applicant stated from the dock that he saw some men with guns on Penwood Road, one of whom intimated that they were going to attack the Olympic Gardens Police Station. He was given a bottle to make a bomb (fill with sand). He complied because he was afraid of what they might do to him. When Constable Green enquired of him what was happening, he lied in explaining that "man was screechying pon them", i.e., men were hunting them. He was afraid that the men would kill him and the police officer if he revealed the truth. When Wayne Smith, the co-accused requested a pair of trousers, the applicant handed them over because he wanted them to leave. He assisted in hiding the guns which the men brought with them after the event because he did not wish his family or himself to be molested. He

He signed a statement because he was told it could do him no harm. He did not go to the police station nor did he kill any policemen: he was at home at the material time.

This defence was described as duress and indeed was left to the jury by the learned trial judge. Mr. Cruickshank complained firstly that she misdirected the jury as to the evidence which raised the defence. In expanding on this theme, he said that she had misquoted the evidence. He referred us to page 487 where the learned trial judge is recorded as saying this -

> "These men are no strangers to him. I say no strangers because he has called names, so they are not strangers to him. They left guns with him to hide."

He argued that there was no evidence that the applicant hid any guns. But even the applicant himself admitted hiding guns, when he came to give his unsworn statement. That he assisted in secreting guns is also plain from the cautioned statement he gave to the police. We are not impressed with this argument: it has no merit whatever.

He went on to say that in an otherwise "fairly accurate" statement of the law of duress, the learned trial judge placed a burden on the applicant to supply evidence of duress. He based this proposition entirely on the use of the descriptive word "cogent" before evidence and at a later stage the word "compelling" as affecting evidence.

The learned trial judge expressed herself in these terms at pages 493-494:

> "Mr. Foreman and members of the jury, what the accused has said here is that what he did was not a voluntary act and that when he made the bombs and when he gave them the pants and when he hid the guns, he was not doing it of his own free will and that he was acting because of fear of the men, he was afraid of the men, what they would do to his family and himself. You will have to decide whether the will of the accused man was over-powered by the men. Did they do anything to him or say anything to him to make him have a feeling, an apprehension of death or harm to his family if he did not do as he was told?

> "What the accused has purported to raise is the defence of what we call duress, and it is going to be for you to say whether what he has said is such as affords cogent evidence of duress. Now, because the burden of proof is on the prosecution to prove the guilt of the accused, it is not for him to prove that he was acting under duress. Once he raises the issue, provided it is properly raised, it is for the prosecution to satisfy you so that you feel sure that he was not acting under duress and that has to be proved."
>
> [emphasis supplied]

Thereafter, she gave perfectly correct directions on duress. At page 494, for example, she stated the law thus:

> "What is duress in law? Duress consists of words spoken or of conduct on the part of some other person which impels, forces the defendant to commit the offence because he has good cause to fear that either himself or some member of his family will either be killed or seriously injured if he does not do what he is asked to do, and the fear that was spoken of was a fear which would have impelled or forced a person who is sober, a person of reasonable firmness, a person having the same characteristics as the defendant could have forced such a person to have done the same thing that he did, what he said he was impelled to do.
>
> The threats that he speaks of must be operating on his mind at the time when it was committed. Now, Mr. Foreman and members of the jury, to say that there is duress you first have to ask yourselves, what is it that he reasonably believed the men had said or done? And you have to answer that question. What had they done to put this fear in him? All he says is that he was afraid. He doesn't tell us why."

In R. v. Delroy Prince (unreported) SCCA 31/83, Kerr, J.A., made the following sapient observation which is applicable to the present circumstances:

> "It is a disservice to a summing-up to take in isolation certain passages and interpret them without due regard to other passages treating with the same questions or issues."

The learned trial judge correctly pointed out to the jury that since it is the defence who have raised duress then there was an evidential burden cast on them. But having made that point, she was quick to direct the jury that the burden was on the prosecution to prove guilt and

he was not obliged to prove that he was acting under duress. She examined the evidence given by the defence in this regard to show that it would not be sufficient merely to assert that he was afraid because "duress consists of words spoken or of conduct on the part of some other person which impels, forces the defendant to commit the offence ....." (p. 494). It is in the sense that the applicant had given absolutely no evidence whatever either of words or of conduct which could raise any reasonable belief in him that his life was at risk. This case illustrates the grave disadvantage to an accused where he seeks comfort in the dock and is thus unable to answer questions from his own counsel as to his beliefs, intentions or the like mental element. Then, there was material before the jury on which they would be entitled to find that the applicant had opportunities to save himself but declined to avail himself. When he was in the company of the police officer (Constable Green), he lied. He did not confess any fear nor attempt to leave the gang. Nevertheless, worthy of note is the fact that when he was arrested by the police, his statement then was that he knew about it but he had not gone up there.

The evidence thus put forward by the applicant for the jury's consideration did not constitute duress. The learned trial judge as it seems to us, in being fair to the applicant, was saying no more than there was an evidential burden on the applicant to put forward evidence amounting to duress on which they could act. The words "provided it is properly raised" make this view abundantly clear. The burden of proving guilt rested on the prosecution who were required to prove, i.e., to satisfy you so that you feel sure that he was not acting under duress and that has to be proved". Nowhere in her directions did the learned trial judge indicate that there was any burden on the applicant to prove duress. We are not able to see how the words - "and it is going to be for you to say whether what he has said is such as affords cogent evidence of duress." Indeed, at page 497 she is recorded as saying - "Look for evidence, it's an evidential burden that he bears." We are not persuaded that there is any merit in this argument.

Finally, counsel contended somewhat faintly that she had "watered down" the effect of the defence of duress. Learned counsel drew our attention to the following passage at p. 497 where the learned trial judge said this:

> "There must be some compelling evidence for you to look at to determine why he acted as he did, but it is a matter for you."

We cannot agree that those words in some way or other, denigrate the defence because it is in that sense we interpret the phrase used by counsel. The sentence quoted above was preceeded by the following observation:

> "It is for you, Madam Foreman and Members of the Jury, but I will say that it could never be sufficient for him to just get up and say, 'I was afraid'."

The learned trial judge stated the law accurately and clearly. Duress is not raised by the mere assertion of an accused that he was afraid. He must lead evidence that he was acting solely as a result of threats of death or serious injury to himself or another, operating on his mind at the material time.

In our view, the directions were impeccable. They were eminently fair to the applicant. We wish to add that everything that could be said was said on his behalf. Although no arguments were addressed to us on any other aspect of the case, we have, nevertheless, looked at the case as a whole, considered both the facts and the summing-up and can find no basis on which the summing-up can be successfully impugned nor the verdict of the jury disturbed. The jury, we are satisfied, were entitled to arrive at the verdict they did for it was justified on the facts.

It was for these reasons that the application was refused.