JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL 186/2000

BEFORE: THE HON. MR. JUSTICE FORTE, P.
THE HON. MR. JUSTICE LANGRIN, J.A.
THE HON. MR. JUSTICE PANTON, J.A.

REGINA V. RICARDO WILLIAMS

Jack Hines and Miss Nancy Anderson for the applicant

Carrington Mahoney, Deputy Director of Public Prosecutions (Acting) and Miss Gail Johnson, Crown Counsel, for the Crown

December 10, 11,2001 and November 7, 2002

PANTON, J.A.

At the end of the hearing of this application for leave to appeal against a conviction of murder, we refused it and ordered that the sentence was to commence from February 9, 2001. We indicated that we would have put our reasons in writing, and this has now been done.

There were four original grounds of appeal. Two were abandoned. The remaining two (Grounds 1 and 2) were as follows:

> "1. That the learned trial judge erred in law in failing to find:
>
> (a) that the Crown had failed in proving that the statement given by the appellant was voluntary, in that the appellant gave sworn evidence of being

beaten yet the Crown failed to introduce evidence as to what occurred up to the point the appellant was seen by Corporal McRae on the 11th July, 1994.
(b) That (sic) caution statement taken by the appellant who was a juvenile of twelve years old was taken in breach of the guidelines of the Judges' Rules.

2. That the comments made by the learned trial judge and his ultimate findings on the 'voire dire' demonstrated that he did not appreciate that the burden of proving that the statement was voluntarily given, rested throughout on the Crown and that the standard of proof was beyond a reasonable doubt."

Three supplemental grounds were also argued. These were re-numbered as follows:

"3. That the learned trial judge erred when he gave his ruling and or reasoning on the voir dire (see page 155 of the transcript) in stating that he did not believe the accused that he was badly beaten (that is, prior to the point where he was seen by Corporal McCrae on the 11th July, 1994) as there was no evidence or sight of any bruise on him in that:

(a) Corporal McCrae's evidence on page 15 of the transcript that he cannot recall seeing any injuries cannot be elevated to mean that there were no injuries and bruises

(b) Because the injuries or bruises were not seen does not mean there were no injuries or bruises (see for example questions by Mr. DeLisser on page 178).

(c) Even accepting that injuries or bruises were not seen or might not have been seen does not mean the accused man was not beaten.

4. That he further erred when he permitted the defence counsel to question the accused to establish the truth of the statement and further used his answer in concluding that the statement was

voluntarily made (see **Wong Kam-Ming vs. R.)** Privy Council Weekly Law Reports January 29, 1979).

5. That he further erred in law in that he is not justified in finding the statement voluntary or admissible just because he doubts the veracity of the accused or could not regard him as a witness of truth or positively disbelieved him (see page 161 Sattaur and Mohammed (sic) 2 W.I.R. 1976)."

THE FACTS

During the morning of May 26, 1994, Det. Cpl. Roy McCrae who was then stationed at Hunt's Bay Police Station, received information which caused him to go to Caribbean Sea Drive in Seaview Gardens, Saint Andrew. There, he saw the body of a man lying under a motor van. It had a bullet wound to the head. This find resulted in the detective commencing enquiries. On July 11, 1994, he saw the applicant in the office of Superintendent of Police Gause who was then in charge of the Criminal Investigation Branch (CIB) at Hunt's Bay. Also present in the office was Detective Sergeant Leslie Ashman. The Superintendent gave to the Corporal a cautioned statement that had earlier been recorded from the applicant.

Corporal McCrae subsequently spoke to the applicant at the Hunt's Bay lock-up. He informed the applicant that it was being alleged that he had shot and killed the deceased and that he was about to charge him for the offence of murder and illegal possession of a firearm. He cautioned the applicant who responded thus:

"A Booker-T give mi the gun fi shoot Driver: and if mi never do it, him woulda shoot mi ah."

Thereupon, he arrested and charged the applicant.

The prosecution relied on this oral statement as well as on the written cautioned statement recorded in the Superintendent's office. In that statement, the applicant stated that he had retired to bed when he was sent by a lady named Miss Joy to buy cigarettes. On his return, he saw two of his friends, Booker-T and Ritchie. He stopped to play ludo with them. Later, he interrupted the game to deliver the cigarettes to Miss Joy. He then returned to Ritchie's yard and later all three friends set out seeking Driver (the deceased) whom Booker-T had openly expressed the intention to kill. They went to Booker-T's cousin who gave Booker-T a gun described as a "spechie". According to the statement, Driver was seen under a car. Booker-T shot Driver in his head while he was under the car. Booker-T then gave the gun to the applicant who proceeded to shoot Driver in the head. They then ran back to Ritchie's house where the applicant gave the gun to Ritchie who in turn gave it to Moonie who had come to retrieve it. The applicant then went home.

On June 6, 1994, Dr. Memory Stennett, pathologist, performed a post mortem examination on the deceased. Externally, she observed a single entry wound to the left temple. There was no burning, blackening or tatooing, which meant that the muzzle of the gun was more than eighteen to twenty-four inches from the body when the gun was fired. On removing the scalp, she observed a bullet entry wound to the left temporal bone. There were three associated fractures of the skull. Three metal fragments resembling portions of casing and

bullet were recovered from the brain tissues. There was one injury to the left section of the head, approximately five centimetres above the left ear. The bullet travelled horizontally from the left temple across to the right temple, and it lodged in the head. Death was due to gunshot injury to the head with injury to the brain.

At the trial, the applicant objected to the admission of the cautioned statement into evidence. The learned trial judge conducted a voir dire at the end of which he ruled that he had no doubt that the statement was voluntarily given, and therefore fit for the jury. He rejected the suggestion that the applicant had been badly beaten.

The applicant, as is so customary in this jurisdiction, shunned the witness box and in an unsworn statement to the jury he said that he was on his way to purchase something for a friend, Miss Joy, when his "little friend, Booker-T" "jook" him "with a gun" and ordered him to stop. According to him, Booker-T told him that he had to do anything he Booker-T ordered him to do otherwise he would kill him. He said he witnessed Booker-T "fire a shot under the car same time". He then saw blood coming from under the car. Booker-T gave him the gun and instructed him to fire a shot. He complied. Booker-T then grabbed the gun out of his hand and he (the applicant) then went back to his yard. He never got to buy the thing for Miss Joy and he remembered nothing after that.

Grounds 1, 3 and 5 were argued together by Mr. Hines for the applicant. In those grounds, he complained of the failure of the prosecution to

negative the evidence of the applicant given on the voir dire that he was beaten; and that there was no evidence of what took place before Cpl. McCrae saw the applicant in Superintendent Gause's office. He also complained of a breach of the Judges' Rules in the failure of the police to secure the attendance of the parents of the juvenile applicant at the giving of the statement. The reasoning of the judge, he said, was flawed in deciding to admit the statement.

The alleged use of violence on the applicant

At the voir dire, the prosecution called evidence from Sgt. Ashman as to the circumstances of the giving of the statement. He said that Supt. Gause had called him to his office and told him of the wish of the applicant to give a statement. Supt. Gause called Mr. Castel McCormack, Justice of the Peace on the telephone. When the Justice of the Peace arrived, he (Ashman) took him and the applicant into another room where the statement was recorded and signed and witnessed by them. There was also evidence from the Justice of the Peace. In the eyes of Sgt. Ashman, the applicant never seemed to be in any distress. Mr. McCormack specifically asked the applicant if he had been "threatened, beaten or anything" and the applicant replied in the negative. He (the applicant) also told the Justice of the Peace that he was making the statement of his own free will.

The applicant who gave evidence on the voir dire said that on the day prior to the giving of the statement he had been arrested by the police who beat him. These policemen were, he said, part of a team known as the ACID squad. He was taken to Half Way Tree police station, and then transferred to Hunt's Bay

police station where he was asked to repeat to the police there what he had told the ACID squad police. When he said that he had not told the ACID squad anything, he was further beaten. According to the applicant, he then got fed up and concocted a story which was reproduced in writing and which he signed. Surprisingly, in his unsworn statement before the jury, he substantially repeated this concocted story--that is, that he was given a gun by Booker-T and instructed to fire it.

Nowhere during the voir dire was any suggestion put to either Sgt. Ashman or Mr. McCormack that the applicant had been beaten. Whereas it is understandable that the suggestion was not put to Mr. McCormack, it is surprising that it was not put to Sgt. Ashman if only because he was a police officer stationed at Hunt's Bay and it was being alleged that policemen at Hunt's Bay had committed this atrocity. This beating was supposed to have taken place on the day of the giving of the statement, and the clear evidence is that Sgt. Ashman was at the station on that day.

So far as the provision of refreshments is concerned, Sgt. Ashman said that the applicant asked for none. The applicant on the voir dire said that he asked for refreshments, but his request was made of Cpl. McCrae. The record indicates, however, that this was never put to Cpl. McCrae.

The complaint that the prosecution had failed to prove admissibility was misconceived. The circumstances before the learned trial judge were such that he was in a position to assess the factual situation and conclude, as he did, that

in his view there had been no beating and that there was nothing to prevent the admission of the statement in evidence. It was reasonable for the learned trial judge to consider the impact of the alleged beatings on the frame of the juvenile and to assess whether such beatings would have left visible physical signs that would have been seen by the Justice of the Peace in particular.

The absence of the applicant's parents

At a sitting of the English Court of Criminal Appeal on January 24, 1964, the revised edition of the Judges' Rules, approved by a meeting of all the Queen's Bench Judges, was announced. There is a rule which deals with the interrogation of children and young persons. It reads, so far as relevant, thus:

> "As far as practicable children (whether suspected of crime or not) should only be interviewed in the presence of a parent or guardian, or, in their absence, some person who is not a police officer and is of the same sex as the child..."

Mr. Hines, in his submissions on this aspect of the case, relied on **The State v. Abdool Azim Sattaur and Rafeek Mohamed** (1976) 24 W.I.R. 157.The headnote reads in part:

> "The admissibility of Sattaur's confession was objected to at the trial on two grounds (a) that it resulted from "pressure" and was not free and voluntary, and (b) that as he (then 15 going on to 16 years) was a young person or a juvenile, the taking of the statement in the absence of his parent or guardian was a breach of the letter and spirit of the Judges' Rules. The judge nevertheless admitted it at the trial as voluntarily taken, refusing to exercise his discretionary power of exclusion for the alleged breach of the Judges' Rules and the question raised

> in this appeal was whether his decision to do so was right."

At page 162 A-C of the judgment of Haynes, C., the following factual situation is stated:

> "To establish the admissibility of the confession, the State at first relied on Corporal Simon only; and he was cross- examined at some length. At the end of it all, the State's case appeared a simple and straightforward one. The statement was taken, the Corporal said, in the presence and hearing of Constable Waldron; after a proper caution no assault or threat or promise or other inducement happened. He believed that as the accused was a young person who could neither read nor write, his parent or some other adult civilian should be present. Although his mother had refused to attend, he felt she would still do so, and in fact he was instructed to wait for her. But he did not after he was instructed to take a statement. He did not feel it necessary then to invite a civilian to stand in."

The relevant rule in **Sattaur's** case was in identical terms to that quoted above. Haynes, C. at page 164C commented thus:

> "Plainly, this rule so worded, puts no obligation on the police to have the appellant's mother or some other adult present, even though Corporal Simon believed so. For this reason, rightly, there was no breach, and so no basis on this ground for the application of the provision in the rules that: "Non-conformity with these rules may render answers and statements liable to be excluded from evidence in subsequent criminal proceedings." But even if it did, the operative word "may" would have left the court free to hold that, despite a breach, the statement (already held to be voluntary) would be admitted, as was held in **Conway v. Hotten** (1976) 2 All E.R. 213. The effect of the Rules was long ago stated by Lord Goddard, C.J. in **R. v. May** (1952)

> 36 Cr. App. Rep. 91 at page 93, in this passage:
> 'The test of the admissibility of a statement is whether it is a voluntary statement. There are certain rules known as the Judges' Rules which are not rules of law but rules of practice drawn up for the guidance of police officers; and if a statement has been made in circumstances not in accordance with the Rules, in law that statement is not made inadmissible if it is a voluntary statement, although in its discretion the court can always refuse to admit it if the court thinks there has been a breach of the Rules.'
>
> It is plain that the trial judge's ruling in this respect cannot be faulted."

In the instant case, the parents of the applicant were not present. However, there was an adult male in the form of one of Her Majesty's Justices of the Peace. There was therefore no breach of the rule. Even if the applicant did not know that Mr. McCormack was a Justice of the Peace, that would not nullify the fact that an adult male who was not a police officer was present.

Ground 2 complains that the comments of the learned trial judge during the voir dire demonstrate a lack of understanding of the relevant law.

During exchanges between counsel and the Bench at the conclusion of the evidence adduced on the voir dire, the learned judge said this:

> "And you have alleged, and the principle of he who alleges must prove must apply." (page 125, lines 1 and 2).

It was clearly incorrect to suggest that there was a burden of proof on the applicant. Mr. deLisser was very quick with a response. He said:

> "I will answer that when I come to look at the elementary principle of the law as it deals to (sic) a voir dire."

To that His Lordship said: "okay, all right". However, later, he appears to have been persisting with the view by saying:

> "Mr. deLisser, every criminal case (sic) lies on the prosecution and it never shifts. But the issue on the voir dire, it is my opinion, if this is so, the defendant is challenging because we have evidence in the trial, both Sgt. Ashman and the Justice of the Peace said as far as they are concerned nothing untoward took place and that the young man gave a voluntary statement; that is their evidence. And this is evidence of the prosecution in an effort to prove it was voluntary. But now we are on the issue because you have challenged it on that issue. It is my view that a burden lies upon the accused."

Subsequent to this, he was addressed at length on the law by Mr. deLisser who was followed by Mrs. Fraser for the Crown. At page 145 lines 16 to 25, continuing through to page 146 lines 1 to 4, she said:

> " At the outset m'Lord, I concede that yes, the burden and standard of proof does rest on the Crown to establish that the caution statement on which we seek to rely was voluntarily given by the accused man, we take no issue with that. However, m'Lord, whereas the legal burden does rest and remain throughout on the Crown, I would submit that the accused person having raised the issue as to being beaten by the police, there is an evidential burden on the accused as to what he says happened. He claims that he was beaten on at least three occasions prior to him being seated by Mr. McCrae. However, m'Lord, he at no time complained, even while he was giving evidence, that he sustained any injuries from that or from those encounters."

We are of the view that by the time the learned trial judge came to make his ruling, his misconceptions had been corrected and laid to rest. Counsel have a duty to assist the Court and this was done in this case. In the face of the submissions of both counsel, it is impossible to think that he would still have held resolutely to the view that he had originally expressed.

Ground 4, it should be recalled, complains that the learned trial judge erred in permitting "the defence counsel to question the accused to establishing the truth of the statement and further used his answer in concluding that the statement was voluntarily made". This is what the judge said:

> "On the evidence before me, I have no doubt that the statement was taken, that it was given voluntarily, and the accused man admits that it is true what he said, and although he did give evidence that he was so badly beaten- you have by some fifteen men- I don't believe that." (page 155 lines 6-11).

It is incorrect to say that the learned judge used the applicant's answer to his counsel to conclude that the statement was voluntarily made. A proper interpretation of the above quoted passage indicates that the judge found that the statement was voluntarily made on the basis of the evidence presented to him. He merely added, not as a reason for his judgment, but as a statement of fact, that the applicant had admitted to the truth of the statement. Such an admission is not equivalent to saying that the statement was voluntarily made.

So far as permitting defence counsel to inquire of the accused as to the truth of the statement is concerned, reliance has been placed on the case **Wong Kam-ming v. The Queen** (1979) 2 W.L.R. 81. There, on a trial for murder, the

defendant gave evidence on the voir dire and admitted that he had made the statement but had not been cautioned and had been induced to make the statement, and then forced to copy and sign it. During cross-examination by the Crown, the defendant admitted being involved in the murder. The judge ruled the statement inadmissible. The trial continued, and the judge allowed the Crown to produce the shorthand writers' record of the evidence given by the defendant on the voir dire. The defendant gave evidence before the jury and was cross-examined as to discrepancies between his evidence before the jury and what he had said at the voir dire. He was convicted.

On appeal, so far as this aspect of the case was concerned, the question for the determination was whether during the cross-examination of a defendant in the voir dire, questions may be put as to the truth of the challenged statement. The Privy Council answered that question in the negative.

We agree with Mr. Mahoney for the prosecution that there is a significant distinction between that case and the instant one. According to Mr. Mahoney, the principle in **Wong Kam-ming** operates as a shield against the prosecution in that no questions are allowable from the prosecution to the defendant as to the truth of the statement. In our view, it hardly needs to be stated that cross-examination of an accused person by a prosecutor is very different from examination-in-chief of an accused by his own counsel. In the former case, one can expect the eliciting of, and ferreting for, evidence that incriminates the accused. In the latter case, the examiner is the accused person's own counsel

whose aim is to put forward evidence in favour of the position being advanced by the accused.

The applicant at the trial had the benefit of the services of an experienced counsel. In the normal course of events, the applicant would not have needed any protection from the judge, as is now being suggested by Mr. Hines. It seems more likely that the situation may have been created by the veering of the applicant from the instructions that he may have given his counsel. It is reasonable to think that experienced counsel would not have asked the question unless his instructions indicated that the answer was one with which he and the applicant would have been comfortable. This ground therefore fails.

In our view, there was no merit in any of the grounds that were argued. The foregoing are our reasons for the conclusion at which we arrived.