WMS

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 27/97

BEFORE: THE HON. MR. JUSTICE GORDON, J.A.
THE HON. MR. JUSTICE PATTERSON, J.A.
THE HON. MR. JUSTICE HARRISON, J.A.

REGINA
vs.
RICARDO WILLIAMS

Terrence Williams for the appellant
Miss Lorna Shelley for Crown

September 28 - 29, 1998, and March 26, 1999

HARRISON. J.A.

The appellant was convicted by a jury in the Home Circuit Court presided over by Ellis, J. on the 13th February, 1997 of the murder of Leslie Grant committed on 26th May 1994, and sentenced to be detained at the Governor-General's pleasure.

The Crown's case was based on a confession statement given by the appellant to the police and witnessed by a Justice of the Peace.

The facts as disclosed in the said statement are that the appellant along with one Booker T. and Richie went to the area where one Driver lived. Booker T. punctured Driver's car tyre and all three left and went to the home of one Diago, Booker T's cousin, who gave Booker T a gun. Booker T said in the appellant's presence that he was going to kill Driver, and asked Richie if he Richie was going to help him to murder him. Richie answered that he did not know. The appellant, Booker T and Richie returned to Driver's

home. Driver was then underneath his car. Booker T went up to the car and shot Driver in his head. Booker T gave the gun to the appellant who "shot... him in a him head." The appellant gave the gun to Richie and they all left.

Detective Corporal McRae said he received a report on the morning of 24th May 1994 and went to Seaview Gardens in the parish of St. Andrew and saw the dead body of a man lying "under a van" with a wound to his head; the body was removed to the morgue. On 11th July, 1994 Detective McRae saw the appellant along with Detective Sergeant Ashman and a Justice of the Peace at the Hunts Bay police station, along with the said and later received the said statement from Detective Sergeant Ashman duly signed, by the appellant and witnessed. Detective McRae arrested the appellant for the murder of Leslie Grant, cautioned him and the appellant replied:

> "A Booker T give me the gun fi shoot Driver and if mi never do it him would a shoot me sah."

Detective McRae knew of Diago and of Booker T in the Seaview Gardens area.

The cautioned statement was admitted in evidence without objection. There was no challenge as to its voluntariness. No voir dire was held.

Dr. Memory Stennett gave evidence that she performed a postmortem examination on a body identified by Henry Harrison as Leslie Grant, on 6th June 1994. The cause of death was due to a single gunshot wound to the left side of the head, with damage to the brain.

The appellant gave sworn evidence that "...that day with Booker T and Driver.." he was at Seaview Gardens, on his way to the shop when Booker T called him and he "...dip him hand in him belly and draw out de gun and call me and den me go to him."

Booker T walked to Driver's car and fired a shot underneath the car. He then saw blood come from underneath the car and saw "him foot." Booker T then said to the appellant "Tek it or I kill you", and as a consequence the appellant "... tek it and fire one shot."

The appellant in cross-examination admitted that he signed the pages of the cautioned statement after having seen Detective Ashman write on it, denied that he told the police what is contained in it or witnessed it or that a Justice of the Peace was present and witnessed it when he signed. The appellant said he fired the shot because he did not want Booker T to kill him.

The appellant was therefore at this latter stage denying authorship of the confession statement which had already been read to the jury having been admitted as an exhibit. The authorship of the said statement was therefore first raised in the cross examination of the appellant. Counsel for the appellant had not raised previously any challenge to its voluntariness or authorship.

Mr. Williams argued as ground four, having chosen not to proceed with the original three grounds of appeal, that:

> "4. The learned trial judge failed to order a voire dire into the circumstances under which the applicant gave the caution statement."

The confession statement of an accused must be voluntarily given in order to be admissible in evidence. The said statement of the appellant was admitted on the basis of the evidence of Detective Sargeant Ashman, that:

> "He made the statement of his own free-will. He was not promised anything, put under any duress or threatened."

There was no initial denial that the statement was given voluntarily and therefore it was unnecessary when first tendered in the prosecution's case to hold a voir dire. However when the appellant said in cross-examination that he did not tell the police what was contained in the statement, he was thereby denying its authorship, and therefore the question of its admissibility arose. The relevant portion of the evidence of the cross-examination of the appellant reads:

"Q. You gave a statement to the police?

A. No, sir, only sign mi name.

Q. Only signed your name?

A. Yes, sir.

Q. Did you give them a statement?

A. No, sir.

Q. You told the police how it 'goh'

A. No."

At this stage of the proceedings the question of voluntariness, arising for the first time, the question arose as to whether or not it was incumbent on the learned trial judge to re-consider and make a ruling on the admissibility of the said cautioned statement: **(R.v. Watson** [1980] 2 All E.R. 293 - although there, a voir dire had been conducted). This is so although its contents were already evidence heard by the jury and moreso because it formed the entire basis of the prosecution's case. In the circumstances of this case the learned trial judge had an obligation to reconsider his ruling. He not having done so, the appellant was denied the benefit of a ruling. If the learned trial judge had subsequently

reversed his ruling and ruled that the said statement was not voluntary or that he doubted its voluntariness, he would have been obliged to direct the jury to disregard it and to acquit the appellant. If he ruled that it was voluntary he would have been obliged to direct the jury to consider its voluntariness and the circumstances under which it was taken, not as to its admissibility but as to its weight and value: **(R. v Delroy Townsend** unreported S.C.C.A. No 23/92 delivered 31st. May. 1993).

In **Ajodha vs. The State** [1982] A.C. 204 the Board of the Judicial Committee of the Privy Council, in considering the issue of voluntariness of the confession statement of the appellant, said at page 223 (per Lord Bridge):

> "(2) Though the case for the defence raises an issue as to the voluntariness of a statement in accordance with the principles indicated earlier in this judgment, defending counsel may for tactical reasons prefer that the evidence bearing on that issue be heard before the jury, with a single cross-examination of the witnesses on both sides, even though this means that the jury hear the impunged statement whether admissible or not. If the defence adopts this tactic, it will be open to defending counsel to submit at the close of the evidence that, if the judge doubts the voluntariness of the statement, he should direct the jury to disregard it, or, if the statement is essential to sustain the prosecution case, direct an acquittal. Even in the absence of such a submission, if the judge himself forms the view that the voluntariness of the statement is in doubt, he should take the like action proprio motu. (3) It may sometimes happen that the accused himself will raise for the first time when giving evidence an issue as to the voluntariness of a statement already put in evidence by the prosecution. Here it will be a matter in the discretion of the trial judge whether to require relevant prosecution witnesses to be recalled for further cross-examination. If he does so, the issue of voluntariness should be dealt with in the same manner as indicated in paragraph (2) above." (Emphasis added)

In **Benny vs The State** (1981) 34 WIR 236, where the issue of voluntariness was raised for the first time during the currency of the appellant's case but no voir dire was held, the Court of Appeal of Trinidad and Tobago, relying on **Ajodha's** case, allowed the appeal, observing that (per Sir Isaac Hyatali):

> "The applicant was, in the circumstances, deprived of a ruling by the judge to which he was entitled and this, in our opinion, was a fundamental departure in a criminal trial from one of its important procedural rules, to the protection of which the applicant was undoubtedly entitled at his trial. This conclusion, in our view, is sufficient for this court to hold that there was a miscarriage of justice in this case and that the conviction and sentence cannot stand." (At p. 242)

In the instant case, the learned trial judge in error, directed the jury that the confession statement "was not challenged". He directed the jury in this way:

> "You remember that although the accused in the witness box denied it that he never made it, but you will have to look on that because it was not challenged, what he said in that statement." (Emphasis added)

He had a duty when the issue was raised during the cross-examination of the appellant to consider whether or not to exercise his discretion to recall the relevant witnesses for cross-examination. If he chose not to, in view of the challenge he was still obliged to reconsider the issue of voluntariness. Having failed to reconsider and make a ruling on the admissibility of the cautioned statement the learned trial judge thereby denied the appellant the opportunity of an acquittal. It was in the circumstances, in our view fatal in that the appellant was denied a fair trial. We find great merit in this ground. Although we find that this ground was sufficient to dispose of this appeal, we find that the other grounds argued were of enough importance to require our consideration.

Counsel for the appellant argued as ground 5:

> "5. The learned trial Judge failed to properly direct the jury on how they ought to approach their task of evaluating the applicant's caution statement."

The trial judge's directions to the jury on the treatment of the cautioned statement were in these terms:

> "The question which you will have to look at and answer on the defence's case put forward there is; is he mistaken in saying that his bullet hit anybody? A matter for you. Because I am saying all this, Members of the Jury, to say that you will have the opportunity to look into it when I am reviewing the evidence further that there was this caution statement. You remember that although the accused in the witness box denied it that he never made it, but you will have to look on that because it was not challenged, what he said in that statement.
>
> Then, Members of the Jury, again, I have to leave this with you on the whole matter, that you have to consider the person who alleged that there was duress. This was, apparently from the evidence, at the time of this incident, a boy of 14 years old. Of course, some 14-year-olds are precocious and all sort, and you will have to look at all those circumstances to see whether or not, although duress is not a defence, but whether or not the thought that the person who was forcing him would have killed him; what effect that would have on a 14-year-old mind. You have to consider that. I leave that to you.
>
> Remember, he was cross-examined by Mr. Reece. Then he told you that he went to buy cigarettes and he saw 'Booker-T'. He said he didn't know him before. He knew Richie, but 'never goh to Richie yard to play any ludo.' Then, Members of the Jury, you will recall he has completely or he completely denied ever giving the Caution Statement operated by Sergeant Ashman, spoken by Ashman. He said he didn't give the police any statement in cross-examination. He denied telling the police, 'how it goh'. He said he only signed both pages of the paper. He didn't see anybody sign after he did."

"Again, Members of the Jury, you are entitled to draw inferences and you look at that Caution Statement, Exhibit 1. Look at it and see if there are any lies you think he told there. You are entitled to draw an inference here about the car being punctured.

Members of the Jury, you will recall that I asked him questions as to whether he did tell Sergeant Ashman what is said in the Caution Statement. He said, "No." So, you have two sets of circumstances; one from him and one from the Caution Statement.

You will recall that the Caution Statement was not challenged. Nobody was cross-examined on it or whatever. You may conclude that, I am not saying that you should - you may conclude that this young accused person is lying. if you think he is lying, you must not hold that against him. People lie for all sorts of reasons. Adults and youngsters may come and say something different because they have been influenced so to do. So, you mustn't hold that against him. You have to consider the evidence carefully.

The funny thing about this case, you know, Members of the Jury, some of what he told you coincides with what is in the Caution Statement; about his firing. So, you have to look at that carefully. That was his case and his cross-examination, Members of the Jury."

"In relation to this statement, the statement which he gave about who would kill him and on the other hand, you may ask yourself the question, "But - soh yuh get a gun, yuh soh 'fraid, why yuh never fire on who force yuh and run gwan." it is a matter for you. All these things you will so consider."

"So, in that statement which you are entitled to take, Exhibit One, he says, Ashman says that was his correct statement. There were no threats or any inducement held out to him and it was his voluntary statement. The statement was read into the records and again I told you, that you are entitled to take."

The learned trial judge failed to direct the jury that they were to consider its voluntariness and the circumstances under which it was taken to determine its weight and

value; **R. v. Delroy Townsend** (supra). The learned trial judge failed to do so. Mere directions that, "...you have to look on that", "it is a matter for you, " or "All these things you have to consider" , are unhelpful and inadequate. The absence of directions amounts to a misdirection. We also find merit in this ground.

Grounds 6 and 7 were argued together. They read:

> "6. There being no evidence to establish that the same person allegedly shot by the applicant, or in the applicant's presence, was the same person on whom a Post Mortem was performed; the learned trial Judge ought to have ruled that there was no case to answer.
>
> 7. The learned trial Judge's directions on proof of death were misleading and failed to indicate to the jury that they would need to find that the person named as deceased was killed by some action of the applicant."

In support of the above grounds counsel argued, that there was no nexus between "Driver", referred to by the appellant as having been shot under the car, and Leslie Grant named as deceased in the indictment. The police did not provide that nexus. The discrepancy that arose on the evidence of the appellant that two shots were fired and the medical evidence that one gunshot wound was on the body, further destroyed any link. Neither did the cautioned statement give any dates or specific place where "Driver" had been nor indicate that he was in fact dead. Counsel relied on **R v. Florence Bish** (unreported) SCCA No. 112/97 delivered 18th February, 1978 and the principle highlighted in that case.

We do agree that the learned trial judge was less than helpful to the jury on this vital point. He directed them in these terms:

> "You heard first the witness Harrison, who is the deceased's brother-in-law, tell you that he went and he

> identified the body to the doctor who performed the post-mortem examination.
>
> You heard Detective Corporal McRae who told you that he saw this body, made investigations and then had the body removed to the morgue.
>
> Then, you heard Dr. Memory Stennett who told you that she performed a post-mortem examination on the body of Lesley Grant. This is trite, but I have to remind you with your common sense that you can't perform the post-mortem examination on a live body. So, you have not got to accept it from me, but you may find on the evidence that Lesley Grant is dead."

However, we find that there was sufficient circumstantial evidence from which the jury could have concluded that the deceased Leslie Grant named in the indictment was in fact "Driver". The appellant in his cautioned statement stated that "The ... morning", Driver was under a car at his Driver's home when both he and Booker T shot Driver in his head. Herman Harrison, the brother-in-law of the deceased identified the body of Leslie Grant living at "Seaview St. Andrew", at the morgue to Dr. Memory Stennett who found one gunshot wound to his head. Detective Corporal McRae on 24th May 1994 at 11:00 a.m. went to Seaview Gardens and saw "the body of a man lying under a van", dead with a wound to the head. He had the body removed to await postmortem examination and commenced investigations. On 11th July 1994 Detective McRae saw the appellant at the Hunt's Bay police station and the appellant said he wanted to "tell ... how it go." Subsequently Detective McCrae received the cautioned statement read it, went to the lockup, cautioned the appellant and "...told him of the offence of murder and also the offence of illegal possession of firearm." Detective McRae then said, in evidence:

> "I told him I am going to charge him for both offences of which I did"

and the appellant replied:

> "A Booker T give me the gun fi shoot Driver and if mi neva do it him would a shoot me, sah."

This is evidence of the response of the appellant himself, to the formal and specific charges of murder and illegal possession of firearm involving the deceased Leslie Grant.

We do not find on this evidence, the lacuna alike that which existed in the **Bish** case and therefore this ground fails.

Ground 8 complained that:

> "8. The learned trial Judge erred in not upholding the no case submission as the crown's case was tenuous due to severe and inexplicable contradictions between the applicant's caution statement and the forensic evidence."

In advancing this ground counsel for the appellant referred to the evidence in the cautioned statement, namely that two shots were fired to the head of the deceased and to the medical evidence, which disclosed one gunshot wound to the head. This inconsistency he said made the evidence tenuous and the learned trial judge should have upheld the submission of no case to answer, following the observation in **R v Galbraith** (1981) 73 Cr. App.R. 124.

The relevant portion of the headote to that case reads, on page 124:

> "Where, however, the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury."

This is the course recommended that the learned trial judge adopt in circumstances:

> "2. If there is some evidence but it is of a tenuous character, i.e. because of inherent weakness or vagueness or because it is inconsistent with other evidence."

The evidence which was inconsistent with the medical evidence of the finding of one gunshot wound, is contained in the said cautioned statement. It reads:

> "When we go round a Driver. When we go round deh, Driver ween under the car and Booker T goh up to the car, gi him a shot in a him head because him ween under the car. Booker T then gi mi di gun and mi shot him in a him head."

This is evidence at the close of the prosecution's case, of the deliberate act of the appellant from which a jury could conclude as a matter of fact, that he caused the death of the deceased.

The appellant and others were engaged in a joint enterprise. Booker T had expressed an intention to kill Driver, and the appellant accompanied him not unwillingly. The principle in **R v Anderson and Morris** (1966) 50 Cr. App. R 216 would clearly apply. Notwithstanding the nature of the medical evidence the learned trial judge was correct in ruling that there was a case to answer. We found no merit in this ground.

The final ground argued, ground nine, was:

> "9. The learned trial Judge failed to direct the jury on the questions of how:
>
> (a) presence before and during the commission of a crime relates to being part of a joint enterprise.
>
> (b) the application of force might affect the issue of whether or not the applicant had joined a joint enterprise prior to the infliction of the fatal shot on the deceased."

Counsel for the appellant argued that the appellant having accompanied Booker T through fear was not voluntarily present during the killing and so not guilty of aiding and abetting. He reasoned that the learned trial judge had not put the defence properly and fairly to the jury, in that, he failed to direct them that, in a state of fear the appellant fired the gun after Booker T's shot had already shot the deceased, and that under such duress, his presence was not voluntary and he committed no offence.

In his directions to the jury on the issue of duress, the learned trial judge said at page 15 of the transcript:

> "In any event, when you look at what he told you, you have to remember that the Prosecution is praying in aid of this case the doctrine of common design. Remember he went on to say 'Booker-T' said he should take this gun or he will kill him. What he is saying there, Members of the Jury, is that he was acting under some form or duress, but duress is not a defence in a charge of murder; can't plead to that. You can't say that.
>
> Members of the Jury, again, I have to leave this with you on the whole matter, that you have to consider the person who alleged that there was duress. This was, apparently from the evidence, at the time of this incident, a boy of 14 years old. Of course, some 14-year-olds are precocious and all sort, and you will have to look at all those circumstances to see whether or not, although duress is not a defence, but whether or not the thought that the person who was forcing him would have killed him; what effect that would have on a 14-year-old mind. You have to consider that. I leave that to you."

And at page 17:

> "Then he told you again - remember, when I asked him the question, he told you that 'Booker-T', as far as he knows, was around 17. He was fourteen. You have to look at all that with the statement which he explained about being forced to hold this gun; fire it or otherwise he would be killed. Also, you must not lose sight of this circumstance

> which, unfortunately, pervades our society, where bad eggs not only influence people by behavioural pattern, but in many cases, act to the terror of other persons. You have to consider all that.
>
> In relation to this statement, the statement which he gave about who would kill him and on the other hand, you may ask yourself the question, "but - soh yuh get a gun, yuh soh 'fraid, why yuh never fire on who force yuh and run gwan." It is a matter for you. All these things you will so consider."

Mere presence by a person at the scene when a crime is committed, where such person is not acting in concert creates no offence. Where however his presence is non-accidental his continued presence without dissent during the commission of the offence, is evidence for the jury to consider whether or not he is an aider or abettor. **(R.v. Anderson and Morris** (supra).

The appellant in the instant case was not merely present at the commission of the offence aiding and abetting, he was an active participant, a perpetrator, firing the gun at the deceased. His involvement in such circumstances, in the context of the common design projected, cannot benefit from a plea of duress where the offence committed is murder. The learned trial judge quite properly directed the jury on the concept of common design the active part played by the appellant, and that duress was not a defence to the crime of murder.

The appellant maintained that he was under compulsion throughout. His examination-in-chief, in that respect is in these terms, at page 28 of the transcript of evidence:

"Q: Now, you told the police-officer, Mr. McRae, that 'Booker-T' gave you the gun 'fe shot 'Driver', if you never do it, him will shoot - what did you mean by that?

A: I Know him would kill me."

The appellant was an active participant in the commission of the offence and there was evidence on which, on the concept of common design, he could have been found guilty of murder or on his own evidence, at least attempt murder. In that context, it would have been incorrect for the learned trial judge to have directed the jury to consider "whether or not applicant had joined a joint enterprise prior to the infliction of the fatal shot on the deceased". Such a direction would have caused the jury to ignore the evidence of the appellant himself that he had in fact fired a second shot albeit under compulsion. We find no merit in this argument.

Counsel for the Crown argued in support of the conviction, but submitted in the alternative that a new trial should be ordered. One of the tests applied in ordering a new trial is the strength of the prosecution's case. The cautioned statement in the instant case was the principal basis of the prosecution's case. It is our view, because of the reasons we have expressed, sufficient and uncontroverted evidence for a jury to consider.

We therefore order that the appellant be tried anew.

The appeal is allowed. The conviction and sentence are set aside and a new trial is ordered.