J A M A I C A

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL No. 11/76

BEFORE: The Hon. Mr. Justice Leacroft Robinson, P.
The Hon. Mr. Justice Robinson
The Hon. Mr. Justice Henry (Ag.)

REGINA v. SEYMOUR GRANT

Mr. Granville James for Crown.

Mr. Horace Edwards, Q.C. for applicant.

July 14, 15, 1976

PRESIDENT:

This is an application for leave to appeal from a conviction for murder in the Home Circuit Court on February 6, 1976. On July 15, 1976 having set aside the conviction and sentence and ordered a new trial we promised to put our reasons in writing. We now do so.

The deceased Frank Brown, a night watchman at the premises of the Caribbean Preserving Co. on Spanish Town Road, died as a result of a gunshot wound in the face. He was last seen alive when he entered those premises on the night of December 30, 1973. The following morning his body was found lying in a car on the premises. Following investigations by the Police the applicant and one Alcott Hall were charged with the murder of the deceased. The case against the two men rested entirely on statements alleged to have been given by them to the Police. The learned trial judge ruled that the statement allegedly made by Hall was inadmissible and in consequence he was acquitted.

After hearing evidence on the voir dire the learned trial judge ruled that the statement allegedly made by the applicant was admissible and eventually the jury convicted him of murder.

Several grounds of appeal were put forward on the applicant's behalf. One was to the effect that the learned trial judge had misdirected the jury by representing to them that the accused said he had given the statement to the Police but that he had done so only to avoid being further beaten by them. In fact what the accused in his unsworn statement from the dock had said was:

> "Detective Levene come at the lock up. He said to me that he got a statement for me to sign. He escort me to the C.I.D. office. He start to beat me and keep on beating me. I told him that I don't guilty of the offence and him start to beat me same way, my lord, that I must sign. He start to beat me and I tell him that I would agree to sign and he call in that gentleman who come in the box there and I sign my name. I don't know nothing about this matter my lord. I am innocent of this. Through I want him to stop beat me that is why I sign."

There are no doubt cases in which the signing of a statement may be equated with the giving of a statement, but it is clear that in this case what the applicant was saying was that he signed a statement which had already been prepared and for the contents of which he was not responsible. The entire case for the prosecution rested on this statement and it was incumbent on the learned trial judge in dealing with the statement to make it clear to the jury what the accused was saying in relation to it, what were the implications of accepting what he said in relation to it, and that it was their duty to decide whether or not they accepted what he said in relation to it. It is true that the jury must have heard what the applicant said from the dock and that the learned trial judge earlier in his summing-up when giving a resume of the evidence at pages 250 - 251 correctly indicated what the applicant had said. Unfortunately he went on at page 255 to say:

> "In this case, I have decided on evidence which I heard in your absence that the statement which I have just read to you was given voluntarily by the accused. When I was making that determination the truth of the contents of the statement given by the accused was not then of direct relevance. What I had to determine was whether or not the accused gave the statement of his own free will, and I so decided."

The jury may well have been left with the impression that at the trial within a trial evidence was available to the learned trial judge which led him to decide both that the applicant "gave" the statement and that he did so voluntarily. When therefore the learned trial judge proceeded to say, at various later stages of his summing-up:

> "On the other hand, the accused told you that the only reason why I gave that statement it was because I was being beaten by Detective Sergeant Levene and other constables. Detective Sergeant Levene had told me he wanted me to sign a statement and I, in order to prevent them from giving me further beating, agreed to sign this statement. But, what is contained in the statement is not true. I only told them this so that they would stop beating me on that afternoon."

> "..... If you should believe that what the accused has told you is really what took place, that Mr. Levene and other policemen had given him a severe beating and were continuing to beat him until he agreed to make a statement, then you will probably say to yourselves, well, what kind of weight can we give to a statement of that nature; ....."

> " .....if you should find as the accused says that he was beaten to the point of submission and gave a lying statement, the case falls; ....."

and almost at the end of the summing-up:

> "..... but once I have put this statement before you, what you have to consider is the contents of the statement";

the jury may well have been left with the impression that, whatever may have been said by the applicant, they could safely conclude that he had given the statement and all that they had to consider was whether its contents were true. The statement contained considerable detail in relation to the offence and indicated an association with the other accused Alcott Hall so the jury may have felt that, if it

had been in fact given by the applicant it must be at least substantially true. They may therefore have given considerable weight to it without giving any real consideration to the more fundamental question of whether the applicant had given the statement at all. Indeed, they may even have considered that this was a question which had already been decided by the learned trial judge and was not for them to consider. Although there was evidence from the prosecution witnesses to indicate that the applicant had given the statement we considered that in all the circumstances, on this ground alone, the conviction was unsafe and ought not to stand. We therefore treated the application for leave as an appeal, allowed the appeal and set aside the conviction and sentence. In the interest of justice we ordered a new trial at the forthcoming sitting of the Home Circuit Court.

There was another aspect of this matter, however, that caused us grave concern. The learned trial judge having told the jury that it was his duty as a judge to decide whether or not an admission or a statement given by the accused is a voluntary one and having emphasised to the jury that he had already decided, on evidence heard in their absence, that the statement was given voluntarily, then proceeded to tell the jury that their concern was firstly, as to the truth of the matters contained in that statement and that "when you are determining what weight to give to the contents of the statement, you will have to take into consideration the circumstances under which that statement was given."

It was submitted by counsel for the applicant that the effect of this was as follows -

(1) the learned trial judge had told the jury that the issue of voluntariness was not their concern - he had decided that;

(2) they were therefore merely concerned with whether or not the statement was true;

(3) in deciding (2) they should consider the circumstances in which the statement was given but always remembering that it had already been decided that the statement was in fact given voluntarily, consequently they could safely disregard any evidence they may have heard to the contrary.

It seemed to us that there was considerable merit in that submission. We fail to see how a jury can escape being confused if they are to be told that a decision has been reached, on evidence heard in their absence, that a statement was voluntarily given and that while they are bound by that decision, they must nevertheless take into consideration the circumstances under which the statement was given. What if the circumstances suggest to them that it was not in fact a voluntary statement? And what if they were inclined to think that that was an important factor in deciding what weight they should attach to the statement?

The fact of the matter is that a jury is entitled to differ from the judge on the question of whether a statement was obtained **voluntarily** or not, but for different reasons. Voluntariness, as a test of admissibility, is a question for the judge and for the judge alone. But after a statement has been admitted in evidence, voluntariness may become a question for the jury if they should consider it to be a relevant factor in deciding the truth or otherwise of the matters contained in that statement, in which event the question of voluntariness would then become one for the jury and for the jury alone. The effective difference is this. Once the judge is of opinion that the statement was not obtained voluntarily, it is his duty to reject it and therefore not to admit it in evidence whereas a jury may well, in the course of deciding what weight and value should be given to that statement, conclude that it was not a voluntary statement, but that nevertheless its contents were true and may confidently be acted upon.

What should be borne in mind is that the judge's function in this regard is solely as to the admissibility of the evidence and for that purpose, and for that purpose only, voluntariness is a test. If the judge applies that test and concludes that the statement was not voluntary, then that is an end of that matter. The statement is not admitted in evidence, the jury are not made aware of its contents, and therefore are not concerned with its truthfulness or otherwise. On the other hand if the judge applies the test of voluntariness and, concluding that the statement was voluntary, admits it in evidence, then the jury are obliged to consider the statement, its contents and what weight and value should be given to it. In so doing, they are entitled to consider, inter alia, the circumstances under which it came to be obtained and to form their own opinion as to those circumstances. That opinion may well be that it was not a voluntary statement. But even if they so concluded, that is not an end of the matter because voluntariness is not an absolute test of the truth of a statement. It may or may not be, depending on the circumstances, and they may well feel that although in their opinion it was not a voluntary statement, that nevertheless it contents were true and may safely be acted upon.

On the other hand, they may conclude, not only that it was not a voluntary statement, but that it was not the accused's statement at all, that somebody else prepared it and that he merely signed it under pressure so as, for example, to avoid a beating. Then again they may conclude that it was the accused's statement, that he gave it voluntarily, but that its contents were not true. And, of course, they may do no more than entertain genuine doubts. All these are matters for the jury.

As stated by the Court of Criminal Appeal in England in the case of R. v. Murray (1950) 2 A.E.R. 925, per Lord Goddard, C.J. at p. 927:

> "..... the question of its weight and its value was for the jury, and in considering its weight and value, the jury were entitled to form their opinion on the way it had been obtained. Counsel for the appellant was entitled to cross-examine the police in the presence of the jury as to the circumstances in which the confession was obtained. At that time the confession was admissible in evidence, because the recorder had ruled so, but it was entirely within the right of the appellant or his counsel to cross-examine the police and to try again to show that the confession had been obtained by means of a promise or favour. If counsel for the appellant could have persuaded the jury of that, he was entitled to invite them to disregard the confession." (Italics mine).

And Why? Because, as the Court proceeded to point out,

> "if he (counsel for the defence) can induce the jury to think that the confession had been obtained by some threat or promise, its value is enormously weakened. The weight of the evidence and the value of the evidence is always for the jury."

Be it noted, however, that the jury is not obliged to accept the invitation. They may very well agree that the statement was not voluntary and at the same time be convinced of its truth and elect to be guided accordingly.

The complete and unfettered independence of the jury, in deciding on the weight and value to be given to a confession that has been admitted in evidence by the trial judge has also been emphasised by the High Court of Australia in Basto v. R. (1954) 91 C.L.R. 628. In that case, the view expressed in R. v. Bass, (1953) 1 A.E.R. 1064, that if a statement has been admitted in evidence the trial judge should tell the jury that if they are not satisfied that it was made voluntarily they should give it no weight at all and disregard it, was rejected by the Court and its views as to the jury's functions in this regard were expressed thus, at p.640:

> "Once the evidence is admitted the only question for the jury to consider with reference to the evidence so admitted is its probative value or effect. For that purpose it must sometimes be necessary to go over before the jury the same testimony and material as the judge had heard or considered on a voir dire for the purpose of deciding the admissibility of the accused's confessional statements as voluntarily made. The jury's consideration of the probative value of statements attributed to the prisoner must, of course, be independent of any views the judge has formed or expressed in deciding that the statements were voluntary. Moreover the question what probative value should be allowed to the statements made by the prisoner is not the same as the question whether they are voluntary statements nor at all dependent

> "upon the answer to the latter question. A confessional statement may be voluntary and yet to act upon it may be quite unsafe; it may have no probative value. Or such a statement may be involuntary and yet carry with it the greatest assurance of its reliability or truth." (Italics mine).

On the other hand, a jury may very well consider their opinion as to the voluntariness or otherwise of a statement to be a relevant factor in determining its probative value or effect. Hence, in an appeal from Bermuda, the Privy Council in Sparks v. Reginam (1964) 1 A.E.R. 727, at p. 736, had this to say, per Lord Morris of Borth-Y-Gest who delivered the judgment of the Privy Council:

> "If they (statements) were held by the learned judge to be admissible, it was still open to the prosecution and the defence to allow the jury to hear the testimony as to the circumstances under which they came into being so that the jury, forming their own opinion as to the testimony, could decide what weight to give to the statements or could decide not to give any weight at all to them for the reason that they (the jury) were not satisfied that they were voluntary statements." (Italics mine).

It does not, of course, follow that a jury will necessarily attach no weight whatever to a statement because they were not satisfied that it was a voluntary statement, hence the view expressed in R. v. Bass (1953) 1 A.E.R. 1064, and followed in R. v. Sutherland and Johnstone (1959) C.L.R. 440, was not only rejected in the Basto case but also conclusively so by the Court of Appeal itself in the later case of R. v. Ovenell (1968) 1 A.E.R. 933, where it was held that -

> "in deciding in criminal cases on the admissibility of an accused's admission in evidence, the question of its admissibility, and for this purpose the question whether it satisfied the test of voluntariness, was a question for the judge to decide, but the weight to be attached to the evidence, if admitted, was for the jury; accordingly a jury should not be directed, when considering the weight of the evidence, that unless they were satisfied that the admission was made voluntarily, they should disregard it." (See headnote at p. 934).

Indeed, the Court of Appeal in Ovenell's case was fortified in its rejection of the dictum in the Bass case, by the decision of the Privy Council in the case of Chan Wai-Keung v. Reginam (1967) 1 A.E.R. 948, where it was held that the trial judge's directions

to the jury were not open to objection on the ground that he did not add the further specific direction that the jury must be satisfied beyond reasonable doubt as to the voluntariness of the statements before giving them consideration. In that case, which was an appeal from the Supreme Court of Hong Kong, where the relevant law was considered to be identical with the law of England, Lord Hodson, in delivering the judgment of the Privy Council, mentioned "other cases in Australia" (he had previously cited with approval the Basto case) and two Canadian cases, viz. R. v. McAloon (1959) O.R. 441 and R. v. McLaren (1949) 2 D.L.R. 682, to which they had been referred and in relation thereto had this to say, at p.953 H:

> "The commonwealth decisions are all in line with the judgment of Lord Goddard in R. v. Murray ((1950) 2 A.E.R. 925) and in their Lordships' opinion they correctly express the law as to the admissibility of evidence and direction to the jury after evidence has been admitted."

It is helpful, therefore, to have a look also at these Canadian cases, being cases expressly held by the Privy Council to "correctly express the law as to the admissibility of evidence and direction to the jury after evidence has been admitted."

In R. v. McLaren, (1949) 2 D.L.R. 682, the Appellate Division of the Alberta Supreme Court, held that "Once admitted ..... the weight to be given to the confession is entirely for the jury, and in considering weight it is the right and duty of the jury to consider the manner in which it was obtained and all the circumstances connected with its being given. The jury will hence properly consider, not find, whether the confession was voluntary and attach such importance to that fact as they think proper." (See headnote at p. 682).

The actual words of the judgment of the Court, on this point, delivered by Harvey C.J.A., appears at p. 688 and are illuminating. They are as follows:

> "It was contended that the trial judge in effect took from the jury the consideration of the voluntariness of the confession. Unless a confession is voluntary when made to one in authority it is not admissible in evidence and for the purpose of deciding its admissibility the trial judge must find the fact that it is voluntary and such finding by the trial judge has a legal aspect, but once it has been admitted its weight is entirely for the consideration of the jury and

> "in deciding what weight should be attached to it, it is the right and duty of the jury to consider the manner in which it was obtained and all the circumstances connected with its being given. In doing so the jury properly will consider not find whether it was in their opinion given voluntarily and attach such importance to that fact as they think proper. I can find nothing in the trial judge's charge from which any reasonable member of the jury could think that the question of voluntariness of the confession was not a proper matter for their consideration."

In R. v. McAloon, (1959) O.R. 441, the trial judge had directed the jury as follows:

> "You are the sole judges of the truth or falsity of the statements and the weight to be given to them. You have heard the surrounding circumstances given by the officers and how the statements were obtained; and the surrounding circumstances have to be taken into consideration when you are deciding on the truth or falsity of each statement and weight that you are going to give it. Consider all of the statement, but you may reject or accept the statement in whole or in part. You may not attach any weight to it, even though the statement has been ruled admissible as evidence. Remember, it was not made under oath, but you can act on it. Even if you think the statement not voluntary, yet, if you think it was true, you may act upon it."

It was complained that the trial judge failed to charge the jury that if they found that a statement, admitted in evidence, made by the accused, was not voluntary they were bound to reject it. It was held that the charge to the jury was not in error. It was also held that the Bass case should not be followed and that, at p. 444:

> "Once admitted as evidence, the question of its being a voluntary statement, in the sense referred to (i.e. as stated by Lord Sumner in Ibrahim v. The King (1914) A.C. 599, viz. "that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority") is relevant to the weight, if any, to be given to it by the jury, or, to put it another way, the question that the jury must decide is whether the statement is true, not whether it is a voluntary statement. But in coming to a conclusion as to whether they are convinced beyond a reasonable doubt that the statement is true, they may and should consider all the circumstances leading up to and surrounding the making of the statement."

So there we have it. And these are two cases which the Privy Council has opined "correctly express the law as to the admissibility of evidence and direction to the jury after evidence has been admitted."

If, therefore, a jury is entitled to consider whether in their opinion a statement was given voluntarily and to attach such importance to that fact as they think proper, as laid down in R. v. McLaren, and if counsel for an accused person may properly invite a jury to disregard a confession on the ground that it had been obtained by means of a promise or threat, as indicated in R. v. Murray, and if, as declared in R. v. McAloon, the question of whether a statement was voluntary is relevant to the weight, if any, to be given to it by the jury, and if, as stated by the Privy Council in Sparks v. Reginam, a jury is entitled not to give any weight at all to statements for the reason that it is not satisfied that they were voluntary statements, what good can it do for a trial judge to be telling a jury that he had decided that the statement was a voluntary statement? He had so decided for the sole purpose of determining whether or not the statement should be admitted in evidence. And the statement having been admitted in evidence, it then became a question for the jury to consider what weight and value, if any, should be given to that statement. A judge does not assist the jury by confusing them with confidences as to the test or tests he is required to apply in determining questions of admissibility. That is no concern of the jury and to tell them that he has decided something that they are entitled to consider independently of his decision in performing their separate function of deciding what weight, and value, if any, should be given to that statement, can only serve to confuse.

It is appreciated that the view we now express is inconsistent with that expressed by a majority of the Court of Appeal of Guyana in Lindon Harper v. The State (1970) 16 W.I.R. 353, namely, that -

> "it was ..... the duty of the judge, having tried the issue on the voir dire, ... if he had come to the conclusion that the statement was free and voluntary, in his summing-up to inform the jury that he had admitted the statement because he had found beyond reasonable doubt that it was a free and volunary statement, and then left it to the jury to say what weight should be attached to the statement."

It is certainly the duty of the judge to leave it to the jury to say what weight should be attached to such a statement, indeed it is the duty of the judge to leave it to the jury to say what weight should be attached to every bit of the evidence which he sees fit to allow them to hear, - but we reject the notion that it is the duty of a judge to tell a jury why he has admitted a statement, or any other bit of evidence for that matter, unless, of course, some special circumstance occurred in the course of the trial which rendered it advisable in the interest of clarity. And if the majority view of the Court of Appeal of Guyana was meant to be of general application, then, with the greatest of respect, we must beg to differ.

It is interesting to note that in the McAloon case the Ontario Court of Appeal also seemed to be concerned with the possibilities of juries being confused by directions given them on the matter of confessional statements. McKay, J.A. who delivered the judgment of the Court, continued his judgment as follows, at pp. 444 and 445:

> ".....,, once admitted the statement is in the same position as any other relevant and admissible evidence and may be accepted or rejected in whole or in part by the jury. It seems to me that a trial judge would be usurping the functions of the jury to tell them that they should or must reject evidence that has been ruled to be relevant and admissible. They, of course, should be told that they may reject it if they see fit and it is open to a judge to express his opinion as to whether they should reject such evidence but if he does it should be made clear to the jury that they are not bound by such opinion."

He then continued further as follows:

> "There is one other matter to which I should perhaps refer. The learned trial judge in his charge used the words "not voluntary", without any further explanation, in referring to the statement. I am inclined to the view that it would be better practice not to refer to a statement as being voluntary or not voluntary in the charge to the jury. This word as used in connection with statements is not used in its ordinary meaning but only in the special meaning as stated by Lord Sumner in the Ibrahim case, so that if it is used in the charge to the jury its special meaning should also be explained to them. It may well be necessary to use the word because of statements made by counsel in addressing the jury or for other reasons but ordinarily I would think that it

> "would be sufficient to tell the jury, in cases where there is any evidence to support such a conclusion, that if they came to the conclusion the statement was induced by some fear of prejudice or hope of advantage exercised or held out by a person in authority, such circumstance might well lead them to the conclusion that there was reasonable doubt as to the statement being true."

In the result, therefore, it appears to us that a great deal of possible confusion would be avoided if judges were to refrain from telling juries why they decided to admit confessional statements. And should the circumstances of any particular case render it necessary so to do, then the judge should take great care to make it quite clear to the jury that they should come to their own independent views as to every item of circumstance under which the statement is claimed to have been obtained or given, including, if the jury think it relevant, whether it was volunary or not, and come to their own conclusions as to whether any and if so what weight and value should be given to such statement. Failure to do so will more likely than not result in unsatisfactory trials.