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IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 111/88

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

R. v. TREVOR LAWRENCE

D.V. DALY for Appellant

CHESTER STAMP for Crown

31st May & 10th July, 1989

GORDON, J.A. (AG.)

This is an application for leave to appeal from a conviction in the Westmoreland Circuit Court on the 12th of May, 1988 before Mr. Justice Patterson and a jury for the murder of Nadine Stoddart. The application raised questions of law therefore the hearing was treated as the hearing of the appeal, the appeal was allowed the conviction quashed and sentence of death set aside and a conviction of manslaughter and a sentence of imprisonment at hard labour for eighteen years substituted. We now place on record our reasons as promised.

The facts on which the conviction is based are these. On 29th March, 1985 between 10 and 10:30 a.m., Robert Thompson was at Mr. Hayden's home at Grange Hill in Westmoreland standing by a car on the premises. He saw the deceased Nadine Stoddart whom he knew pass on the road going towards the square at Grange Hill with a baby in her arms; shortly after she passed he was called by his uncle Patrick Robinson. He ran to the fence and saw the appellant holding the deceased on the road bank about 3/4 chain away. He saw the appellant deliver one stab to the chest of the deceased. The appellant thereafter ran off and the deceased fell. The witness ran to the gate leading to the road and stood there while the appellant ran and passed him on the other side of the street,

went on the premises of the Anglican Church on the opposite side of the street and disappeared from view. While the appellant was holding the deceased and when he delivered the stab, as also when he passed him at the gate running on to the Church premises, the witness saw the face of the appellant, the witness observed the blade of the knife held by the appellant as he ran, which he described as bloody and as resembling a bread knife. When this appellant disappeared the witness went to where the deceased fell and he observed she was crawling on the road and had stab wounds in her chest. He heard her say "tell me mother and me father say me dead now." The baby was on the road. She stopped crawling after about 1/2 minute and appeared to be dead. Robert Thompson said he had known the appellant for about two months before the incident. He had seen him on about six occasions inside and outside the local club house where he had spent about four hours on each occasion and he had passed him at the gate of his house, about four times in that period.

Mr. Patrick Robinson was on Mr. Hayden's premises by the fence. He said he saw Nadine Stoddart with a baby in her arms on the road. He saw a man whom he said was the appellant approach her and brace her against the bank by holding her in her neck. The deceased said "Trevor you a go kill me?" The appellant proceeded to stab the deceased in the region of her chest. At the first stab the deceased released the baby. The appellant delivered about four stabs to the chest of the deceased with a knife. Mr. Robinson during the incident called to his nephew Robert Thompson who joined him by the fence and both looked on the incident taking place some 3/4 chain away. After the appellant finished stabbing the deceased he ran away. The witness then went to where the deceased was on the ground, Thompson was with him. He heard the deceased say "Tell me mother, tell me father, mi sister and mi brother say Trevor kill me." Then she died.

Detective Errol Williams summoned to the scene, arrived there about 11:00 a.m., and saw the body of the deceased face down by the roadside. He observed stab wounds to the neck, chest, back and hands of the deceased; he carried out investigations and on the 19th April, 1985 at the Savanna-la-mar lock up he arrested and charged the appellant for the crime of murder.

On 30th March, 1985 at about 6:30 a.m., Special Constable Maurice James was at the Bluefields Police Station when he received a report.

He went to the bushes adjoining the station compound where he saw and confronted the appellant. He had known the appellant about two years. He cautioned him and told him he heard he had killed his girlfriend in Grange Hill. The appellant responded:

> "Me never know sey she dead,
> is because she give me her
> nastiness fi drink."

The Constable searched the appellant and removed from his waist a wooden handle knife. He asked the appellant if that was the knife he had used to kill his girlfriend to which question the appellant responded:

> "Is not that one is a smaller one."

The knife recovered by Constable James from the appellant was identified by the witness Thompson as the murder weapon. Other evidence in the case established that there had been an intimate relationship between the victim, Nadine Stoddart and the appellant which had produced a child. The relationship had been at the time of the incident broken off for over one year.

Mr. Patrick Robinson identified the appellant in the dock at this trial. There had been a previous trial and a preliminary enquiry held in this case but it was at this trial for the first time that this witness purported to identify Miss Stoddart's assailant. The witness had also failed to identify the appellant at an identification parade and had identified a volunteer.

The appellant did not give evidence neither did he make a statement from the dock.

Of the three grounds of appeal, Mr. Daly obtained leave to argue, the first two challenged the identification evidence. Mr. Daly submitted that the evidence of Patrick Robinson was not credible and ought not to have been adduced. He said the learned trial judge fell in error when he left the dock identification to the jury as no weight should be attached to it. This is how the judge directed the jury on this point:

> "You are also entitled to consider any
> other evidence in the case which tends
> to support the evidence given by
> Thompson that this is the accused man who
> inflicted the injury. Is there any
> other such evidence? Mr. Foreman and
> members of the jury, you will recall that
> Patrick Robinson, the other witness,
> said he saw this man. He made what is
> called a dock identification. He went
> on an identification parade and not only
> did he fail to point out this accused man
> on the identification parade, but he pointed

> "out somebody else that was not a suspect at all in the case.
>
> Now, the fact that he did not pick out this accused man on the identification parade, and indeed that he picked out somebody else, does not by itself make the evidence of identification completely worthless. It does however, lessen the weight to be attached to that evidence considerably. The evidence is suspect and its weight is considerably reduced. So you will have to bear that in mind when you are considering the identification evidence of Patrick Robinson."

How dock identification should be addressed has been considered on many occasions. In Slinger v. R (1965) 9 W.I.R. 271 (Trinidad) Phillips J.A. in the judgment of the Court said:

> "In our view, questions of identification are essentially matters of fact for determination by a jury and each case must be decided upon its own particular circumstances."

In Slinger's case two prosecution witnesses who did not attend an identification parade identified the accused in the dock at the preliminary enquiry. Mr. Daly's submissions were similar to those made in Slinger's case.

The facts in Herrera & Dookeran v. R (1966)11 W.I.R. are similar to those in Slinger's case and the principle in Slinger's case was applied. In Kirpaul Sookdeo & Ors. v. The State (1972) 19 W.I.R. 407 the [illegible] failed to identify the accused at an identification parade but identified him [illegible] at the trial. Here again Slinger's case was approved. In R. v. Er[illegible] Thomas & Others (1978) 15 J.L.R. 264 [illegible] Thomas and Bailey were [illegible] day of the incident but Hanson was not. The witness gave the police [illegible]nisable individual description of the men who took part in the attack and [illegible] next saw Hanson in the dock. In delivering the judgments of the Court, [illegible] J.A. said at page 265:

> "[illegible] circumstances called for the most [illegible] and positive directions from the learned trial judge as to the dangers inherent in this dock identification."

In R. v. Garth Henriques and Owen Carr S.C.C.A. 97 & 98/86 25. 3. 88 (unreported) a witness failed to point out the appellant [illegible] at an identification parade but identified him in the dock at the [illegible]. It was contended on appeal that the trial judge should not [illegible] the evidence to go to the jury and in that he did, he [illegible] jury [illegible] worthless.

The Court approved and applied the principles of Slinger's case and Errol Thomas' case in rejecting these submissions.

At page 45 White J.A. said:

> "In addition we repeat the remarks of Henry J.A. in R. v. Thomas & Ors (1978) 25 W.I.R. 495. He pointed out the necessity for the summing up to deal with the dangers in dock identification, and that in the absence of a careful and positive direction in that case the conviction could not stand."

and at page 46:

> "............ for our part, we do not agree that the directions of the learned trial judge fell short of what is required on the point. He told them bluntly that "it was not a proper safe and reliable way .... it was my duty to tell you that the identification, that dock identification was not proper, not to be encouraged .... not much weight could be placed on it."

Having regard to the authorities referred to herein we find no support for Mr. Daly's contention. The learned trial judge adopted the correct approach to the identification evidence. His duty was to leave the evidence for the consideration of the jury after having given them a strong warning as to the dangers inherent in this evidence. Robinson's evidence was not the only evidence in the case linking the appellant with the commission of the crime. There was the evidence of Robert Thompson who witnessed the incident. He saw the appellant known to him for two months. The incident occurred at 10:30 a.m., in what was broad daylight. The appellant after committing the offence ran and in running, passed close to the witness Thompson, whose evidence of identification, was positive. There was also the evidence of what the appellant said when he was taken into custody by Special Constable Maurice James. For these reasons we find that the first ground of appeal failed.

In the second ground of appeal Mr. Daly complained:

> "That the learned trial judge in directing the jury as to the opportunity for identification which the witness Robert Thompson had, failed to direct the jury fully and fairly as to the weakness in the identification evidence in that he failed to bring to the jury's attention that the evidence of Patrick Robinson

> "contradicted the evidence of Robert Thompson that the said Robert Thompson had gone to the gate and had seen the face of the accused as he ran past him."

We have scanned the record and the summing up disclosed that the trial judge gave proper directions on the identification evidence as he is required to do by R. v. Oliver Whylie (1977) 15 J.L.R. 163. The impugned passage appears in this context:

> "Now, Mr. Hayden's gate is nearer to Belisle Crossroads than it is to the post office along that fence. The evidence is - Thompson's evidence is that the accused man ran past him on the other side of the road but when he was coming towards him, he saw his face also and when he passed him he saw his back until he ran and went over the church premises.
>
> The evidence is that the accused man was running, when he ran, he ran towards Sav-la-mar and the church premises where it commences is on the opposite side of the road from Mr. Hayden's premises, but it commences opposite to Belisle Crossroads, that's where the church premises commences.
>
> The evidence is uncontroverted that the person who ran away ran in that direction and went over the church premises. That's not controverted. Mr. Foreman and members of the jury, if you consider that evidence you may well say that Thompson did have an opportunity of seeing the face of the accused man who was running away. The man whom he says is the accused man. He said he ran past the gate - that is uncontroverted - to pass the gate to get to the church. And if Thompson is at the gate it must be that the man was running towards him. It seems to me quite simple, but, of course, it is for you to consider and see whether you accept what Thompson has said." (emphasis supplied)

When the evidence is properly analysed it clearly appears that there was no conflict between the evidence of the two witnesses as to the direction in which the appellant ran and as to the position of the two witnesses when he passed by the witness Thompson. We therefore cannot support Mr. Daly's contention and this ground also fails.

The third ground of appeal complained:

> "That the learned trial judge erred in law in withdrawing the issue of provocation from the jury having regard to the evidence of Maurice James that when he informed the accused that he heard

> "he had killed his girlfriend the accused said, "Is because she give me her nastiness fi drink."
>
> "Me never know sey she dead .... is because she give me her nastiness fi drink."

Mr. Daly said these words could have the possible explanation that something very offensive had taken place between the appellant and the deceased so as to cause the appellant to act as he did. He submitted that the Crown in adducing this evidence and in relying on it in proof of the charge cannot have the benefit of it without accepting that which it admits of, namely, provocation. He said further that the trial judge having suggested to the jury the possible meaning to be given to that statement, it was incumbent on him to direct the jury of the possible consequences of the interpretation given to the passage, whether or not it amounted to provocation.

Mr. Stamp submitted that the trial judge was justified in not leaving the issue of provocation to the jury because there was no evidence before the Court raising provocation and making it a live issue and that the judge properly directed the jury on the way to approach the contents of the statement made by the appellant to Special Constable Maurice James. He relied on the decision of this Court in Colin Johnson v. R. S.C.C.A. 89/85 19.6.1987 and R. v. Allan McGann S.C.C.A. 7/87 30.5.88.

The problem posed by mixed statements was considered in Jamaica in Johnson & McGann supra.. In R. v. McGann Kerr, J.A. reviewed the English cases of R. v. Duncan (1981) 73 Cr. App. Rep. 359, R. v. Haman (1985) 82 Cr. App. Rep. 65 and R. v. Sharp (1987) Times Report 22nd January, 1987, (1988) 1 ALL ER 65 and R. v. McFarquhar 12 J.L.R. 1363. In R. v. Duncan, the appellant strangled the woman with whom he was living and took her body to nearby woods, set fire to it ~~and buried~~ it. He admitted he had killed the woman to a neighbour, the police were summoned and the appellant made various statements to them including admitting the killing but he was unable to explain the motive for his actions. He suggested that he must have lost his temper when the victim teased him. At the end of the prosecution's case at his trial for murder he elected not to give evidence or call witnesses. The trial judge after hearing submissions from counsel ruled that the self serving aspects of the appellant's statement were not evidence and he withdrew the issue of provocation from the jury. The appellant was convicted of murder and appealed. He complained that the judge's ruling was wrong.

In delivering the judgment of the Court of Appeal Lord Lane, the learned Chief Justice said at page 365:

> "Where a 'mixed' statement is under consideration by the jury in a case where the defendant has not given evidence, it seems to us that the simplest, and, therefore, the method most likely to produce a just result, is for the jury to be told that the whole statement, both the incriminating parts and the excuses or explanations, must be considered by them in deciding where the truth lies. It is, to say the least, not helpful to try to explain to the jury that the exculpatory parts of the statement are something less than evidence of the facts they state. Equally, where appropriate, as it usually will be, the judge may, and should, point out that incriminating parts are likely to be true (otherwise why say them?), whereas the excuses do not have the same weight. Nor is there any reason why, again where appropriate, the judge should not comment in relation to the exculpatory remarks upon the election of the accused not to give evidence."

In dismissing the appeal the court found that what the appellant said amounted to an attempt by him to rationalise his actions and there was no evidence of provocation by anything the victim said or did.

In R. v. Collin Sharp (1988) 1 ALL E.R. 65 the House of Lords considered the decision in R. v. Duncan (supra) and held that Duncan's case was rightly decided and should be followed. The headnote to Sharp's case reads:

> "Where a statement made out of court by a defendant in criminal proceedings is in part an admission and in parts self-exculpatory, the whole of the statement constitutes evidence of the truth of the facts it asserts and the judge should direct the jury that both the incriminating parts and the excuses or explanations must be considered in determining where the truth lies, although where appropriate, as it usually will be, the judge may, and should, point out that the incriminating parts are likely to be true whereas the excuses do not carry the same weight." (emphasis supplied)

The trial judge in Sharp's case had withdrawn from the jury's consideration the exculpatory part of the prisoner's statement. The Court of Appeal allowed the appeal and this decision was confirmed by the House of Lords.

In his speech Lord Havers accepted the definition of the hearsay rule contained in Cross on Evidence 6th Edition (1985) p. 38 that:

> "An assertion other than one made by a person while giving oral evidence in the proceedings is inadmissible as evidence of any fact asserted."

The speech of Lord Havers continued at p. 68:

> "Evidence contained in a confession is, however, an exception to the hearsay rule and is admissible. The justification for the adoption of the exception was presumably that, provided the accused had not been subjected to any improper pressure, it was so unlikely that he would confess to a crime he had not committed that it was safe to rely on the truth of what he said. This exception became extended to include not only a full confession to the crime but also a partial confession in which the accused admitted some matter that required to be established if the crime alleged was to be proved against him. ....
>
> The difference in the authorities centres on the status to be attached to those parts of a mixed statement that excused or explained an admission and are intended to show that the admission does not bear the inference of guilt that it might otherwise attract: for example, 'I admit that I stabbed him but he was about to shoot me', or, as in this appeal, 'I admit that I was at the scene of the burglary but I was looking for something that had fallen off my car.' All the authorities agree that it would be unfair to admit the admission without admitting the explanation and the only question is how best to help the jury evaluate the accused's statement. The view expressed in R. v. Duncan is that the whole statement should be left to the jury as evidence of the facts but that attention should be drawn, when appropriate, to the different weight that they might think it right to attach to the admission as opposed to the explanation or excuses. The other view, which his Lordship might refer to as the 'purist' approach, is that, as an exculpatory statement is never evidence of the facts that it relates, the jury should be directed that the excuse or explanation is only admitted to show the context in which the admission was made and they must not regard the excuse or explanation as evidence of its truth."

Lord Havers then considered the case of Leung Kam-Kwok v. The Queen (1984) 81 Cr. App. R. 88 and referred to aspects of the judgment of Lord Roskill who gave the judgment of the Privy Council at page 91. In this case Lord Roskill supported what was described above as the 'purist' approach.

Lord Havers continued at p. 71 (e):

> "The weight of authority and common sense lead me to prefer the direction to the jury formulated in R. v. Duncan 73 Cr. App. R. 359 to an attempt to deal differently with the different parts of a mixed statement. How can a jury fairly evaluate the facts in the admission unless they can evaluate the facts in the excuse or explanations? It was only if the jury think that the facts set out by way of excuse or explanation might be true that any doubt is cast on the admission, and it is surely only because the excuse or explanation might be true that it is thought fair that it should be considered by the jury.

In Duncan's case and in Leung Kam-Kwok it was agreed that the entire mixed statement should be left for consideration of the jury. They differed on how the separate parts of the statement should be presented.

The similarity between these cited cases and the instant case is that the appellant said nothing at the trial. How this court regards mixed statements is gleaned from a number of cases which were reviewed by Kerr J.A. in R. v. McGann (supra). The first case reviewed was R. v. McFarquhar (1974) 12 J.L.R. 1363.

The appellant was charged with the knife slaying of the deceased following an incident at a dance. On arrest he said to the arresting officer "I did not cut him fi kill him sir." He later gave a statement in which he admitted inflicting the injury but said that this was done in circumstances which gave rise to self-defence or provocation. At the trial he made an unsworn statement from the dock indicating a defence of self-defence and or provocation. In his directions to the jury the judge left the issues of self-defence and provocation to the jury based on the confession and on the statement from the dock. Manslaughter arising from lack of intent which arose on the statement made after arrest was not left to the jury.

The Court of Appeal held that the judge was not in error in not leaving the oral statement to the jury because that statement was neither consistent with the cautioned statement nor with the statement from the dock.

It is readily recognized that this case which anti-dates R. v. Duncan observed the principles approved in Duncan's case. Caldwood v. R (1967) 10 W.I.R. 262, R. v. Delroy Prince S.C.C.A. 31/83 14th October, 1985 and R. v. Collin Johnson S.C.C.A. 89/85 dated 19th June, 1987 were the other cases reviewed. Kerr, J.A. concluded the review by saying:

> "The statements in the cases of Caldwood, McFarquhar, Prince and Johnson (supra) indicate that issues are raised in Court and not by extra-judicial statements, and, above all, certainly not by the exculpatory part of such a statement which the accused, at his trial, not only denied making but specifically raised an issue inconsistent with that exculpatory part of the statement. There was therefore, no obligation on the trial judge to leave the exculpatory part of the statement as an issue for the determination of the jury. However, where the exculpatory part of the statement relates to an element or fact essential to establishing the case for the prosecution, it therefore emphasises that the onus of proof remains on the prosecution to prove that essential."
> (emphasis supplied)

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The principle to be extracted from these cases is that where at a trial a prisoner denies the contents of a mixed statement made by him and adduced by the Crown and his defence otherwise is rejected by the jury, he cannot afterwards be heard to complain that he should have had the benefit of having the exculpatory aspect placed before the jury.

The appellant said nothing at his trial. In this respect this case differed from those just cited. In the case of R. v. Sharp the trial judge withdrew the expulpatory part of the statement from the consideration of the jury. In R. v. Duncan provocation was withdrawn. In the instant case the judge left the whole statement for the consideration of the jury. At page 135 of the summing-up he said:

> "Mr. Foreman and members of the jury, with that in mind, if you should find that Special Constable James told you the truth you may well say: What these words mean? 'Me neva know say she dead. Is because she give me her nastiness to drink.' Is he saying that: 'Well, this is the first time I am hearing that this woman is dead. My girlfriend is dead and serve her right that somebody kill her. She give me nastiness to drink.'? That's one interpretation, as I see it. Or, is he saying: 'She gave me nastiness to drink and I stabbed her.' 'Well, I killed her or stabbed her but neva know she dead.'

> "Is it an admission that he knew of the incident? If he knew, is it because he did it or is it that somebody else told him about it?"
>
> Mr. Foreman and members of the jury, as I say, you will have to consider those words, you will have to say what they mean and you take it in the context of the entire case."

The learned trial judge in this passage embarked on an interpretation of the statement but he withdrew provocation from them:

> "There is no evidence on which I can , leave the question of provocation .... I have told you that the question of provocation does not arise."

The language used by the appellant is the typical colloquialism of the ordinary Jamaican. The exculpatory part is inextricably bound up with the inculpatory aspect. It contains an admission of involvement in the circumstances of her death and an explanation that it happened because of something that she had done to him. The appellant was clearly indicating that the deceased had done some very offensive act in relation to him which aroused him sufficiently to make the physical attack upon her. This it appears to us is the natural meaning of the words used and in our view the learned trial judge ought to have invited the jury to say what those words meant and what effect, if any, they could have upon the appellant and upon a reasonably man. In his directions the learned trial judge did pose the question, "or is he saying, 'she gave me nastiness to drink' and I stabbed her," "well I knew her or stabbed her but neva know she dead." Is it an admission that he knew of the incident? If he knew, is it because he did it or is it that somebody else told him about it? It seems to us that the learned trial judge was overly concerned at this point with the issue of identification of the assailant, that he inadvertently lost sight of the fact that what was done to the appellant could have inflamed his mind and give rise to the issue of provocation.

The judge did not comment in relation to the exculpatory remarks upon the election of the appellant not to give evidence. He left the statement for the jury to give it such weight as they thought fit. The Crown relied on the statement as an element in proof of the charge. In McGann (supra) Kerr J.A. said:

> "Where the exculpatory part of the statement relates to an element or fact essential to establish the case for the prosecution, it therefore emphasises that the onus of proof remains on the prosecution to prove that essential."

The onus is on the prosecution to prove that when the crime was committed the appellant was not acting under provocation. Where there is no evidence of provocation fit to be left to a jury, provocation may be said not to be an issue. While we agree with the general principles stated by Kerr J.A. when he said:

> "Issues are raised in Court and not by extrajudicial statements,"

we also agree with the passage quoted above which affords an exception to this principle. The exculpatory part of the mixed statement in the instant case could be said to raise the issue of provocation, as the burden of proving that the appellant was not provoked fell on the prosecution, the learned judge was required to give full directions on the law relating to provocation. The judge having withdrawn from their consideration the issue of provocation, the jury were obliged on the directions given by the judge, to disregard it. The only verdicts which were left open to them were guilty or not guilty of murder.

The examination of the cases indicate that mixed statements tendered by the prosecution fall into three basic categories.

1. Where at trial the accused admits authorship, the exculpatory part must be left to the jury by the judge as part of his defence.

2. Where at trial the accused denies making the statement then only that segment which amounts to an admission is left to the jury R. v. McGann (supra)

3. Where at trial the accused says nothing in his defence to the charge then the entire statement must be left to the jury and 'the jury should be directed to consider the whole statement as evidence, giving such weight to the self exculpatory part as they think fit. R. v. Sharp (supra)

and as corollary to this category:

> "Where the exculpatory part of the statement relates to an element or fact essential to establishing the case for the prosecution, it therefore emphasises that the onus of proof remains on the prosecution to prove that essential." R. v. McGann

From this third principle it follows that where a person charged makes a mixed statement and at his trial says nothing in his defence and does not adduce evidence to contradict any part thereof and the prosecution at his trial adduces this statement, the statement becomes evidence in the case for the consideration of the jury, per Lord Chief Justice

In R. v. Duncan p. 365:

> "All the components of the mixed statement were evidence of the facts stated, although their weight as evidence might differ widely."

The victim Nadine Stoddart was attacked on a public road in public view in daylight and viciously stabbed while she was holding a baby in her arms. The sentence imposed is intended to reflect our obhorrence at the manner in which the crime was committed.