JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 109/89

COR: THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.

REGINA

VS

CEDRIC GORDON

F.M.G. Phipps, Q.C. & E.P. DeLisser
for applicant

Miss Cheryl Richards & Patrick Cole
for Crown

25th October & 15th November, 1990

CAREY, J.A.

On 4th July, 1989 in the Home Circuit Court before Ellis J. and a jury, the applicant was convicted of the murder of Leaford Cameron and sentenced to death. He was being tried for the second time for the reason that a new trial had been ordered by this Court.

The underlying facts of this crime which occurred as far back as March 1983, are these:

Sometime on a night in March, 1983 the victim was in an upstairs bedroom at his home in Red Hills, St. Andrew engaged in playing a computer game with two young men, one of whom, Junior Brown, gave evidence at the trial. The other Ainsley Williams had by the time of the re-trial migrated, and therefore was not called to give evidence. Mr. Brown said that having heard suspicious sounds and noticed the silhouette of a man with a gun against a passage wall, he realized that this

applicant had entered the room followed by three other men armed variously with a knife or dagger and an ice-pick. The applicant pointed the gun in the direction of Mr. Cameron, declared the obvious that this was a hold-up, and demanded money and Mr. Cameron's car-keys. The applicant also threatened Mr. Cameron by saying that Cameron and Joe Williams (a former senior police officer) being friends, the police would be sent for him. Thereafter, he stabbed Cameron in his "belly" with a knife with which he was also armed. Next, the applicant forcibly removed his victim from the room. He was not to be seen alive again. In the next act, the applicant's associates trussed up both Brown and Williams and also blindfolded, certainly, Brown. He was able to free himself but was discovered and restored to his former state, the applicant threatening to put him to death. After some discussion in that regard among the intruders, they contented themselves by stabbing the hapless young men and departed.

Brown again freed himself and his companion and sought assistance. On his way out, he came upon the body of Cameron in a pool of blood. The medical evidence showed that death was due to multiple stab wounds to the body mainly to the heart and lung inflicted by a knife or ice-pick.

Mr. Brown gave evidence of the lighting available for identification or rather, recognition because he had seen the applicant on two occasions before his appearance at the slain man's home. The applicant at various times during his traumatic ordeal, was in quite close proximity to him. The room light had been ordered switched on by the applicant himself. The applicant was known to him as "Ricky". Before us, counsel, it should be noted, did not question the quality or cogency of the identification evidence of this sole eyewitness.

Evidence was also adduced that the applicant himself was at some time previously employed by the victim and also lived at his home up to the year 1982. When the applicant was first interviewed by a police officer, Detective Sergeant Robinson and told that he was involved in the Cameron murder, he is alleged to have retorted -

> "Officer when I tell you how it go, you tell me if you would not do the same thing."

It was suggested to him that a written statement would be taken of what he had to say. In acceding to this suggestion, the applicant said - " anything, sir, a the truth me a tell." He did give a second statement under caution which was recorded. In the event, it was not tendered in evidence nor, apparently, did the defence insist nor invite the Crown to tender it. After the applicant was arrested and cautioned, he said - "Long run, short catch, a Cameron cause it." This statement could, we think, be regarded by the jury as amounting to an admission of guilt.

The applicant put forward the defence of alibi and called a witness to confirm his defence.

Before considering the submissions of counsel, we desire to make one comment on the prosecution case. Although the visual identification evidence emanated from one witness, there was evidence capable of corroborating that evidence provided by the applicant's response during the investigating officer's interrogation of him and indeed by his statement after arrest and caution.

Four grounds of appeal were urged before us but save for one of these, the others were without substance. We propose to deal firstly with ground 2 about which something can be said. The ground is set out hereunder -

"2. The learned trial judge wrongly admitted in evidence a statement attributed to the appellant by Police Officer Robinson which statement was introductory to a written statement from the appellant explaining his conduct but never tendered in evidence (pages 101 & 102). The Jury were invited to treat this inadmissable evidence as corroboration of identification (pages 154-5).

The statement about which complaint is made, was of course, never tendered, nor were its contents vouchsafed to us. We are, therefore, quite unable to say what was stated therein but we would suppose, that the statement did not amount to a confession but rather must have been largely self-serving. A matter of some importance also as disclosed in the evidence of Detective Sergeant Robinson who was present when the applicant dictated his statement under caution, was that his initial oral statement was made shortly before his dictated statement.

The basic principle is this. The whole of the confession should be given in evidence for it is the general rule that the whole of the account which a party gives of a transaction must be taken together, and his admission of a fact disadvantageous to himself should not be received, without receiving at the same time his contemporaneous assertion of a fact favourable to him. The case often cited for this proposition is Queen Caroline's Case 1 St. Tr. (N.S.) 1348. Nowadays these statements are referred to as "mixed" statements and the requirement remains the same viz., that the whole statement must be left to the jury. See **R. v. Duncan** (1981) 73 Cr. App. R. 359 and **R. v. Trevor Lawrence** (unreported S.C.C.A. 111/88 dated 10th July, 1989. What then is the position where an accused person in his first interview makes a statement and in subsequent interviews with the police, makes further statements? Should all be admitted in evidence? Where an accused person makes a

voluntary statement to the police, it is evidence because of its relevance as showing the reaction of the accused when first taxed with incriminating facts. R. v. Storey [1968] 52 Cr. App. R. 334. But it may have no such relevance because some time has elapsed for careful consideration or even after legal advice. This subsequent exculpatory statement can have no evidential value, and would not be admissible. R. v. Barberry & Ors. [1979] 62 Cr. App. R. 248. R. v. Pearce [1979] 69 Cr. App. R. 365 is, we think, apposite. The facts which appear in the headnote are as follows -

> " The appellant was taxed by his employer's security officer with incriminating facts relating to handling stolen goods and had denied knowledge of them. Two days later he was arrested by the police for handling stolen goods and taken to a police station where he made two voluntary statements. He was seen there by two detective constables in the presence of his solicitor. The offences involved the sale of two pairs of lambs carcasses. The appellant's first self-serving statement dealt with only the first pair of lambs - he said he had reason to believe they were stolen and that he had sold them for the same price as he paid. Three hours later the detectives again interviewed the appellant during which he denied that he knew the carcasses were stolen, but he said that he sold a second pair of carcasses at a public house, and when asked if he knew the purchasers, said that he did not. The detectives made four pages of notes of that interview. The next day the appellant volunteered another self-serving statement in which he stated that he had no suspicion that the second pair of carcasses were stolen. At his trial, counsel expected that the whole of the interview and both statements would go before the jury. The trial judge excluded the two voluntary statements and part of the interview on the ground that they were self-serving statements and as such not admissible. The appellant was convicted and appealed."

Lord Widgery C.J. at p. 369 took the opportunity to set out three principles which we consider helpful.

> "We would ourselves summarise the principles as follows:
>
> (1) A statement which contains an admission is always admissible as a declaration against interest and is evidence of the facts admitted. With this exception a statement made by an accused person is never evidence of the facts in the statement.
>
> (2) (a) A statement that is not an admission is admissible to show the attitude of the accused at the time when he made it. This however is not to be limited to a statement made on the first encounter with the police. The reference in Storey to the reaction of the accused "when first taxed" should not be read as circumscribing the limits of admissibility. The longer the time that has elapsed after the first encounter the less the weight which will be attached to the denial. The judge is able to direct the jury about the value of such statements.
> (b) A statement that is not in itself an admission is admissible if it is made in the same context as an admission, whether in the course of an interview, or in the form of a voluntary statement. It would be unfair to admit only the statements against interest while excluding part of the same interview or series of interviews. It is the duty of the prosecution to present the case fairly to the jury, to exclude answers which are favourable to the accused while admitting those unfavourable would be misleading.
> (c) The prosecution may wish to draw attention to inconsistent denials. A denial does not become an admission because it is inconsistent with another denial. There must be many cases however where convictions have resulted from such inconsistencies between two denials.
>
> (3) Although in practice most statements are given in evidence even when they are largely self-serving, there may be a rare occasion when an accused produces a carefully prepared written statement to the police, with a view to it being made part of the prosecution evidence. The trial judge would plainly exclude such a statement as inadmissible.
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> In the light of the principles which we have ventured to state there can be no reason for casting doubt on the practice to which we have referred at the start of this judgment,

> "namely, the practice of admitting statements by the accused even when their evidential value is small.
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> The present case falls within both 2 (a) and 2 (b) above. As to the first statement it was relevant to show the attitude of the appellant at the beginning of the interview. The voluntary statement set the scene. There was no reason to exclude it. When it was decided to admit part of the interview, the only fair course was to admit the statement so as to put the interview in context. The same principle applies to questions and answers which were excluded in the course of the interview, and to the second voluntary statement made on the following day. Fairness requires that when there is a long series of questions and answers, interspersed with one or more voluntary statements, they should all be admissible in evidence.
>
> For the reasons which we have given, we conclude that the judge was wrong to rule as he did. The appeal will therefore be allowed, and the conviction quashed."

For the purposes of the present case, we deduce that the decision to admit the subsequent statement will depend on the time that has elapsed after the accused is first taxed by the police with incriminating facts and makes an incriminatory statement. The voluntary statement which was never produced we would think, was made in the context of the applicant's incriminatory remark. He agreed to give and did give a written statement to the investigating officer shortly after being first taxed and responding - "officer when I tell you how it go, you tell me if you would not do the same thing." Plainly in these circumstances, it was most misleading for the prosecution to exclude a statement which could be favourable to the accused. The duty of the prosecution is to act fairly and it could scarcely be said that they had done so, when they presented an unfair picture of the facts and circumstances of the case. We hasten to point out that nothing we have said, requires prosecuting counsel to tender a wholly self-serving statement

when it is not relevant to any issue in the case.

We have every sympathy with the trial judge in this case because he was not to know that the cautioned statement would not have been tendered in evidence. Consistent with what we have said so far, once it became clear that the cautioned statement was not being adduced as part of the Crown's case, he was obliged however to direct the jury that they should leave out of their consideration the statement attributed to the applicant viz., "When I tell you how it go.....". By allowing the matter to remain in that state, the learned judge sanctioned the prosecution's unfair presentation of the facts.

Indeed the matter was exacerbated as Mr. Phipps argued, by the learned trial judge's directions. He said this at p. 156-157 -

> " Now the crown is not obliged to put everything before you. I don't know what has happened, but the evidence which goes on in the case is what you hear from the witnesses, you can't speculate, you don't know, I don't know what has happened, but he can admit there was a statement which was dictated. But he did admit that there is a statement which was dictated."

That direction, viz., that the Crown was not obliged to tender the statement, for the reasons we have endeavoured to adumbrate, was quite wrong and was plainly a misdirection.

We turn to the other grounds which we did not think supportable. First ground 1 -

> "1. The learned trial judge wrongly admitted in evidence the testimony given by Dr. Ramu at a previous trial especially in circumstances where there was no caution from the learned trial judge when he was emphasising the importance of this testimony (pages 83, 140, 141, 142 & 151-2).

> "There was a duty on the prosecution to have presented the previous testimony of Ainsley Williams given at an earlier trial in the same circumstances as that of Dr. Ramu. Ainsley Williams' testimony would have discredited the testimony of the sole eyewitness Junior Brown in the material areas (pages 103-4)."

Mr. Phipps assured us that this ground did not mean what it plainly stated. As a matter of fact, the trial judge so soon as his attention was directed to it by an alert Crown Counsel gave an appropriate warning (at p. 101):-

> "MR. DENNIS: M'Lord, before Your Lordship have the jury retire I just thought I could take this opportunity to alert Your Lordship to something which occurred while the jurors were out, and it is in relation to the evidence tendered through transcript of Dr. Ramu's evidence. Perhaps the usual warning just to indicate that the doctor was not here to be cross-examined, just to indicate to them how they should treat that in the light of the fact that he was not here.
>
> HIS LORDSHIP: All that is a matter of fact.
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> MR. DENNIS: I just thought that a specific direction.
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> HIS LORDSHIP: Mr. Foreman and members of the jury, Dr. Ramu's testimony: Remember that although his testimony was admitted it was not tested by cross-examination here. When it was given it was cross-examined but not counsel who appeared here. So you have to look at it and bear that in mind, that it was not tested in cross-examination and give it consideration that you think it deserves."

The jury left the jury box with the warning which as the ground of appeal asserts, was not given, ringing in their ears. We were then told that the Crown, having tendered the sworn evidence of the pathologist, were obliged to tender similar evidence given by another Crown witness Ainsley Williams. The ground for this

course submitted, was that it discredited the Crown's sole eye-witness. Assuming for the moment that the evidence did have that effect, we do not think there was any duty cast upon the prosecution to put it forward as part of their case. Their obligation would be to make it available to the defence. But we are not required to give a concluded view on the matter. By the leave of the Court, the evidence of Ainsley Williams was produced to us. Far from discrediting the other witness Brown, his evidence completely supports his evidence in every material particular. We do not think Mr. Phipps had any confidence in this ground.

In his ground of appeal No. 3, counsel complained that the learned trial judge failed to direct the jury on the proper approach to evidence of identification which was uncorroborated. He relied on Scott & Walters v. R. Privy Council Appeal No. 2 of 1987.

The trial judge began by issuing the appropriate caveat. At p. 142 he stated it in these terms -

> " The element which is the final one in this case, Mr. Foreman and Members of the Jury, is who did it. Who did it? And that centres, Mr. Foreman and Members of the Jury, around this concept of identification. And let me, at the outset give you the warning that you have to be careful, very careful in dealing with visual identification when you come to that. And the reason for this, Mr. Foreman and Members of the Jury, is simply this, people can and have been known to make mistake as to identity. No doubt about that. On the other hand, in our country where we have such a multiplicity of us, colouration, hair style, facial features, it can also be said that we in Jamaica could be adept at properly identifying persons. But on the other hand you have to heed the warning that you have to be careful when you are dealing with visual identification. And when you are being careful in dealing with visual identification, you have to consider certain circumstances to see if those circumstances are present or were present, could have been impaired or facilitated the witness' identification."

He then continued by identifying certain aspects of the identification as to lighting, time for recognition, previous knowledge, proximity, description to police. In this case, the witness provided the applicant's 'pet-name' Ricky. He warned against confusing honesty with accuracy. His direction, we think, is worth recording. He said (p. 144) -

> "....., but you must remember, as I told you, that you have to be warned - and you are not looking for the confidence with which the witness makes the identification, what you are really looking for is the correctness of the identification....."

The learned trial judge correctly identified the words used by the applicant after arrest and when he had been cautioned as capable of amounting to corroboration, having previously explained to the jury in clear terms its meaning. This is how he expressed himself (p. 144) -

> ".....If you accept that (the words) they were said, stated, maybe - I don't say you must treat them as corroborating what Brown is saying, but they may be corroborative of what he is saying in his identification. Because if you accept that it was said, why would the person say, 'long run short catch, a Cameron cause it'? Would he have known Cameron and know what he is talking about? Matter for you, Mr. Foreman and Members of the Jury. So identification is crucial. crucial."

In our view, the treatment was correct, lucid and fair.

Finally, ground 4 -

> "4. The learned trial judge misdirected the jury as to how they should treat the unsworn statement made by the appellant (pages 137-8 & 158). By telling the jury that the appellant's unsworn statement indicated that he had something to hide, amounted to telling them that he was hiding his guilt."

This Court requested the Privy Council in **Director of Public Prosecutions v. Walker** (1974) 21 W.I.R. 406 to give some guidance of the objective evidential value of an unsworn statement

by an accused person, since it had for some time been the standard practice to keep the accused out of the witness box. That standard practice has become entrenched. Indeed, the Privy Council in **Beckford v. R.** [1987] 3 All E.R. 425 expressed surprise at this practice in a case where an accused's subjective intention was at issue. It becomes necessary to remind of Lord Salmon's words. He said this (p. 411) -

> "There are, however, cases in which the accused makes an unsworn statement in which he seeks to contradict or explain away evidence which has been given against him or inferences as to his intent or state of mind which would be justified by that evidence. In such cases (and their Lordships stress that they are speaking only of such cases) the judge should in plain and simple language make it clear to the jury that the accused was not obliged to go into the witness box but that he had a completely free choice either to do so or to make an unsworn statement or to say nothing. The judge could quite properly go on to say to the jury that they may perhaps be wondering why the accused had elected to make an unsworn statement; that it could not be because he had any conscientious objection to taking the oath since if he had, he could affirm. Could it be that the accused was reluctant to put his evidence to the test of cross-examination? If so, why? He had nothing to fear from unfair questions because he would be fully protected from these by his own counsel and by the court. The jury should always be told that it is exclusively for them to make up their minds whether the unsworn statement has any value, and, if so, what weight should be attached to it; that it is for them to decide whether the evidence for the prosecution has satisfied them of the accused's guilt beyond reasonable doubt, and that in considering their verdict, they should give the accused's unsworn statement only such weight as they may think it deserves."

In this country, an accused person, irrespective of the allegations against him and indeed irrespective of the court, clings to the sanctuary of the dock to assert an alibi.

In this case, the applicant used the unsworn statement to charge the slain man with being "a bugger," and to refute evidence given by a police officer who stated that he knew the applicant, to deny statements attributed to him and therefore explain away evidence against him. Plainly therefore, this was the sort of case in which the guidelines quoted above are applicable.

The judge did not parrot the language of the learned Law Lord. He used homely Jamaican language. He used these words (pp. 137-138) -

> ".....That unsworn statement, Mr. Foreman and Members of the Jury, has not been tested by cross-examination. You don't know how it could stand up under cross-examination. Is it right to do that? The law guarantees him that right, but as twelve judges of the facts, you also are entitled to ask yourselves the question: why did he choose to make an unsworn statement? Why didn't he expose his story to the light of cross-examination? Why? Is it that he was averse to taking the oath, he doesn't swear on the Bible? Couldn't be, because there is provision that you can confirm. He has not got to use the Bible. Is it that he has something to hide? Matters for you. Is it that he is afraid that any untoward advantage would be taken of him? Couldn't be, because he was represented by counsel who does not apologise for his vehemence in defending his case. He would be up there objecting if anybody was going to do anything. It could not be that the judge would sit down here and see advantage being taken of him and don't say anything, because I have to hold the scales evenly; and you are entitled to ask yourselves, Mr. Foreman and Members of the Jury, why did he not put his testimony or his explanation under the crucible, under the bounds and burner of cross-examination? But when you are doing that, you must recollect that the law gives him that right to do that.
>
> You have to consider the unsworn testimony, give it what weight you think it deserves, because although it has not been sworn, it is still a part of the proceeding. So you have to give it what weight it deserves. It has not been subjected to cross-examination."

Objection is taken really against the suggestion that the applicant had something to hide. In our view, the whole thrust of these guidelines is to satisfy the natural curiosity an intelligent juror would have where an unsworn statement is being made. Lord Salmon suggests that a possible thought which would arise in such a juror's mind — What had he to fear? In Jamaican terms, from what was there to hide? Was he hiding from taking the oath, from cross-examination or from unfair questions? In our judgment, the learned trial judge founded himself squarely on the guidelines as enunciated by Lord Salmon. Parliament, we trust, will one day abolish this vestigial tail of the law of evidence.

The question which remains is a consideration of the proper disposal of this case. Miss Richards, with commendable economy and lucidity pointed to the strength of the Crown's case especially the identification evidence about which no complaint was leveled. There was, she argued, ample evidence apart from the impugned statement. Mr. Phipps said the proviso was not applicable to this case which called for a careful direction on identification.

We think there is much merit in these submissions of learned Crown Counsel. The Crown's case was, in our opinion quite strong. The applicant's statement which was clearly admissible after caution, provided corroboration as it strengthened the visual identification evidence of the sole eye-witness called by the prosecution.

Accordingly, although we are of the opinion that the point raised in ground 2 about the wrongful admission of the statement made to Police Officer Robinson must be divided in favour of the applicant, we are nonetheless satisfied

that no miscarriage of justice has actually occurred.

For these reasons, we have come to the clear conclusion that this application for leave should be refused. It is accordingly refused.