JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 29/92

BEFORE: THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE GORDON, J.A.
THE HON. MR. JUSTICE PATTERSON, J.A. (Ag.)

REGINA vs. FITZROY SMITH

Lord Gifford, Q.C. for the applicant

Margaret Ramsay-Hale for the Crown

November 21, 1994 and February 1, 1995

PATTERSON, J.A. (Ag.):

The applicant was convicted on the 12th March, 1992, of the murder of Excel Brown, and was sentenced to death after a trial by jury presided over by Pitter, J. in the Circuit Court for the parish of Hanover. He applies to this court for leave to appeal against his conviction and sentence.

The deceased was a police constable who lived with his family at Haddington in the parish of Hanover. At about 7:00 o'clock in the evening of the 15th August, 1990, he drove his car to New Mills District in Hanover and stopped it in the gateway of one Job Wright. As he alighted from the car he was approached by four men, one of whom was identified as the applicant. One of the men demanded the key to his car. The deceased informed him that the key was in the car. He then shot the deceased and they all made off with the car, leaving the deceased behind mortally wounded. The deceased was taken to hospital and he later succumbed to his injury.

Two days later, Detective Corporal Morant, acting on information he had received, went to a funeral home in Montego

Bay and there he saw the bodies of two men. These bodies were identified as being those of two of the four men who were on the scene at the time the deceased was shot. Detective Corporal Morant later went to the Cornwall Regional Hospital and there he saw the applicant who was a patient in bed, suffering from a gunshot wound. Detective Corporal Morant did not know the applicant before then and so he identified himself and told him that he was investigating a case of robbery with aggravation, shooting with intent and illegal possession of firearm and ammunition, and that he believed he (the applicant) may be able to assist him in his investigations. The applicant then said, "Officer, me want to tell you how it go." Detective Corporal Morant thereupon cautioned the applicant and asked him if he wanted "to make a written record" of what he had to tell him, and the applicant said "yes".

It is critically important to appreciate the sequence of events leading up to the taking of the statement under caution, because it forms the basis for Lord Gifford's argument against the admission in evidence of that statement. Detective Corporal Morant testified that from the hospital, he went to the Police Area One Headquarters and spoke with Detective Assistant Superintendent of Police Stanley in relation to the applicant. Detective Assistant Superintendent Stanley said that Detective Corporal Morant spoke with him at about 2:00 p.m. on the 17th August and as a result he went to the Cornwall Regional Hospital where he saw the applicant in a bed suffering from a gunshot wound to the abdomen. He spoke with a doctor and after that with the applicant, but he was not advised that the applicant had undergone an operation. Detective Assistant Superintendent Stanley said he introduced himself to the applicant and told him that he had been informed of his intention to make a statement "in respect to robbery and shooting of Excel Brown at Haddington on the 15th August." The applicant replied, "Yes-sah". He told the applicant that he had a right to have an attorney-at-law or any other person of his choice present at the time the statement

was being recorded, and more importantly, that it was his right not to make a statement, whereupon the applicant said, "It is alright sah, me no have to have anybody present because me naaw tell no lie." Nevertheless, Detective Assistant Superintendent Stanley told the applicant that he would rather have a Justice of the Peace present and the applicant agreed. Detective Assistant Superintendent Stanley testified that on the 18th August he wrote the statement which the applicant dictated in the presence of Mr. Lopez James, a Justice of the Peace, who signed as a witness to the various signatures of the applicant appearing on it.

The prosecution proposed to tender the statement in evidence as part of its case, no doubt to put the applicant on the scene of the murder and bolster the identification evidence, but the defence objected to its admission, on the ground "that the circumstances under which the statement was taken or allegedly given would not make the statement a voluntary one." Additionally, the defence contended "that no statement was given by the accused man, Fitzroy Smith, and any statement that is here to be tendered is not that of Fitzroy Smith." In light of the objection, the voluntary character of the statement was put in issue, and it was incumbent on the learned trial judge to hear evidence on the voir dire to decide the question of its admissibility. This he did in the absence of the jury, and having ruled that it was voluntarily given, the statement was admitted in evidence.

Before us, Lord Gifford, Q.C. argued one ground of appeal pertaining to the conviction of the applicant, and it is this:

> "The learned trial judge erred in law in admitting into evidence a signed statement under caution alleged to have been made by the applicant."

No misconduct or impropriety was alleged against the police as to the manner in which the statement was taken and recorded.

However, counsel contended that the circumstances under which the statement was taken were so oppressive that it could not possibly be said to be a voluntary statement. He urged that the free will of the applicant was "undermined". He anchored his argument on the fact that the "interview" took place when the applicant was "seriously injured" and had undergone a life-saving operation on the previous day, and was in bed "with drip to his arm and a bag to his body." He said that in those circumstances the prosecution could not show, without adducing medical evidence, that the applicant was in a fit condition to offer a statement and appreciate the caution.

The learned trial judge found as a fact that the applicant was in hospital "suffering from some injury, and he was in bed." The Justice of the Peace testified that before the statement was taken, he asked the applicant if he was alright and the applicant said "yes". The learned trial judge interpreted this to mean that there was an enquiry whether the applicant "felt in a condition to be able to say what he wanted to say" and the answer was "yes". He accepted the evidence of the applicant that he was conscious on the 17th before he had the operation; and despite the fact that he was suffering from the injury he was nevertheless conscious and did speak with Detective Assistant Superintendent Stanley. The applicant further admitted that on the 18th, when Detective Assistant Superintendent Stanley and the Justice of the Peace, Mr. James, attended the hospital, he was conscious.

On that evidence, the learned trial judge found that "the accused man knew all along, on the 18th, what was happening around him. He does not seem to be affected by any operation which he might have had on the 17th, the day before." Lord Gifford questioned this finding, but it appears to us that it is an inescapable inference which could reasonably be drawn from the proven facts. Lord Gifford further submitted that the learned trial judge did not consider whether on the facts, as led

by the prosecution, it was proved that the statement was voluntary in the sense that it was not made in circumstances of oppression; this was really the main thrust of counsel's argument. He referred us to the note to **Martin Priestley** [1965] 51 Cr. App. R. 1 and relied in particular on that part of the ruling of Sachs, J. (as he then was) where he said:

> "...I had not been referred to any authority on the meaning of the word 'oppression' as used in the preamble to the Judges' Rules, nor would I venture on such a definition, and far less try to compile a list of categories of oppression, but, to my mind, this word in the context of the principles under consideration imports something which tends to sap, and has sapped, that free will which must exist before a confession is voluntary. ... Whether or not there is oppression in an individual case depends upon many elements. I am not going into all of them. They include such things as the length of time of any individual period of questioning, the length of time intervening between periods of questioning, whether the accused person has been given proper refreshment or not, and the characteristics of the person who makes the statement."
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> [Emphasis supplied]

It is an overriding principle that before an admission made by a person accused of a criminal offence is admitted in evidence against that person, it must be established that it is voluntary. The Judges' Rules, which are intended to guide police officers conducting investigations and to ensure that, as far as possible, statements from accused persons are not improperly obtained, provide (at note (e)) that before a statement by an accused is admitted in evidence, it must be proved to have been voluntary, in the sense that "it has not been obtained from him by fear of prejudice or hope of advantage, exercised or held out by a person in authority, or by oppression." In **R. v. Prager** [1971] 56 Cr. App. R. 151, the question arose as to whether the prosecution had proved that the applicant's oral admissions and signed statement, alleged to have been obtained by oppression, were made voluntarily. Edmund Davies, L.J.

in delivering the judgment of the court, said (at pp. 160-161):

> "In **Commissioner of Customs and Excise v. Hartz and Power** (1966) 51 Cr. App. R. 123, at p. 155; [1967] 1 A.C. 760, at p. 818 Lord Reid, in a speech with which all the other Law Lords agreed, treated the test laid down in principle (e) in the introduction to the Judges' Rules as a correct statement of the law."

We consider that statement of the law to be applicable in this case. There can be no doubt that the learned trial judge had in mind that principle. After a very careful review of the evidence presented on the voir dire, he finally said:

> "I find that the statement was written at the dictation of the accused man, that Superintendent Stanley wrote as the statement was dictated to him and that at the end there he read back the statement to the accused which he signed voluntarily. Having rejected the defence that the statement was obtained by force, and I seek to split them, when one puts them back together, I find no such oppression was used at all, neither by way of force, neither by way of any oppressive questioning, neither by way of any attending circumstances which would leave the court to believe that the accused man was so oppressed that whatever he said or whatever he did, that is to say, if he said anything or that if he did sign this statement, it was done either through force or either by oppression. ... I find that this statement was given voluntarily. Hence, the statement will be admitted in evidence."

Lord Gifford expressed the view that in the circumstances of this case, it was incumbent on the prosecution to establish by medical evidence that the applicant was in a fit state to make the statement, and that the judge was obliged to make a finding of fact as to the applicant's capacity to know what was going on, and generally, to make the statement. This he said the learned trial judge failed to do, and that it appears that he may have shifted unto the applicant the burden of proving that the statement was given under oppressive circumstances. We do not agree with counsel. We are of the view that the learned trial judge was fully aware that the burden of proof rests squarely on the

shoulders of the prosecution. It is clear that it was the applicant who offered to give a statement in writing and that he was conscious and coherent at all relevant times.

Finally, in spite of the evidence as to the physical condition of the applicant at the time he gave the statement, there was no evidence upon which the learned trial judge could have correctly concluded that the statement was obtained by oppression. On the contrary, in our judgment, there was ample material for the learned trial judge to conclude that the statement was voluntary. We see no reason for holding that he erred in law in admitting the statement in evidence. We see no merit in this ground.

The next ground argued was based on the classification of the offence of which the applicant was convicted, having regard to the provisions of the Offences against the Person (Amendment) Act, 1992 ("the amendment Act"), which amended the Offences against the Person Act ("the principal Act"), and which came into operation on the 13th October, 1992. This is a case where the applicant was convicted and under sentence of death for murder prior to the commencement date of the amendment Act, and in accordance with the provisions of that Act, it fell to be determined whether the murder to which the sentence relates is classifiable as capital or non-capital murder, and for the appropriate sentence to be determined in accordance with the principles set out in the principal Act.

Counsel for the Crown quite frankly conceded that in the circumstances of this case, the murder for which the applicant was convicted ought to be classified as non-capital. Although the deceased was a policeman, it does not appear that the murder was committed while he was acting in the execution of his duties, nor was it established that the applicant's participation was such that it would constitute in him the offence of capital murder. We are satisfied that had the question of capital murder

or non-capital murder arisen at the trial, the jury would have come to the conclusion that the applicant was guilty of non-capital murder, and accordingly, the appropriate sentence is mandatory imprisonment for life.

In the event, Lord Gifford was invited to address us on the question of the period the applicant should serve before becoming eligible for parole, having regard to section 3A(2) of the principal Act. He submitted that there is a distinction between a man who deliberately kills his fellow citizen but whose act is now defined as non-capital murder and a man who is a passive party to a joint venture. He argued that the degree of "moral responsibility" for the killing is greater in the former case than the latter. He submitted further that the applicant was not the "principal" in this case; he did not cause the death. He referred to previous decisions in which the court classified persons as having committed non-capital murder and specified that they serve between 20 and 25 years imprisonment before becoming eligible for parole. He submitted that in the instant case, the court ought to take into account the term already spent in prison by the applicant pending the hearing of his appeal.

In considering what is an appropriate period that a person convicted of non-capital murder and sentenced to life imprisonment should serve before becoming eligible for parole, the court must have regard to the circumstances of the case and the part that the convict played. The court is not here concerned with determining the appropriate sentence, the law prescribes mandatory life imprisonment. What the court considers is the earliest time, when, in its view, it would be appropriate to release the convict on parole. Gordon, J.A., delivering the judgment of the court in S.C.C.A. 77/91 **R. v. Donald Cousley** (unreported) delivered March 15, 1993, after pointing out that the court is given a discretion to "specify a period, being

longer than seven years", which the convicted murderer must serve before becoming eligible for parole, said:

> "Parliament has thus emphasized that a distinction ought to be maintained between life imprisonment imposed for non-capital murder and life imprisonment imposed for any other crime."

The guiding principle is that the convict should serve a period long enough for the purposes of retribution and deterrence before becoming eligible for parole. We repeat here what the court said in **Cousley's** case (supra):

> "...we desire to make it abundantly clear that murder remains an abhorrent crime and anyone convicted of non-capital murder must expect to serve a period of retribution and deterrence which must necessarily be long."

We have already alluded to the circumstances of the instant case, and outlined the role that the applicant played. There can be no doubt that the applicant and three others were all part and parcel of a joint enterprise. They were not resident in the area or even in the parish. The applicant, in his caution statement, admitted hearing just before the attack that the deceased was a policeman and that he had a gun, yet he did not withdraw himself from the others. He remained in their company, and according to him, he saw one of his members shoot the policeman. He nevertheless went in the policeman's car with the others and drove away. It is plain that he had either a tacit or express agreement with the gunman and the others to inflict really serious bodily harm or death to the policeman if it became necessary. We were not told whether or not the applicant has a criminal background, but this is the sort of case where, in our view, the absence of a criminal background would make very little difference. His conduct has been such that we think that he is a real danger to society and it will take a long time for him to derive any benefit from his imprisonment.

The result is that the application for leave to appeal against conviction is refused. The murder is classified as

non-capital. The application for leave to appeal against sentence is granted and the hearing of the application is treated as the hearing of the appeal. The sentence of death is set aside and a sentence of life imprisonment is substituted therefor. The court specifies that the appellant serves a period of twenty-five years before becoming eligible for parole.

Cases referred to

1) Marlon Priestley (1965) 51 Cr App R 1
2) R v Prager [1972] 56 Cr App R 151
3) R v [illegible] SCCA 77/91 – [illegible]