CA CRIMINAL LAW — Murder — Trial — cautioned statement — whether voluntary — voir dire — Jury — whether judge should have left on unanimity to the jury — convicted. [CA: Judge misdirecting commands re unconstructed police evidence of confession] Application for leave to appeal refused. Case considered to: (1) R v Watson (1988) 1 All ER 897 (2) R v Waldham (1952) 36 Cr App R 167 (3) R v Creavey (1955) 37 Cr App R 179

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 95/90

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

CRIMINAL PRACTICE
EVIDENCE

REGINA VS FITZROY WILLIAMS

Derrick Darby for applicant

Lancelot Clarke Jnr. for Crown

26th February & 16th March, 1992

CAREY, J.A.

On 30th May, 1990 in the Manchester Circuit Court before Patterson, J. and a jury the applicant was convicted of the murder of one Owen Davis who was shot to death at his home at Heartease in Manchester. There was no eye-witness to this murder and accordingly the verdict of the jury rested entirely on their acceptance of a confession made by the applicant.

Counsel filed two grounds of appeal which were most assuredly, not filed in a timely manner. Both related to the voir dire. He ventured some arguments in relation to ground 1 only but declined to pursue the other. He sought and obtained our leave to make some observations of the use of certain language in the course of his directions to the jury by the learned judge on an occasion when they were being sent back to the jury room for further consideration of the verdict. His observations albeit critical of the judge's language, he did not intend to qualify as a ground of appeal. Howsoever that might be, the nature of the case impels us to consider all his submissions and as well, the case as a whole.

In the cautioned statement which comprises some five foolscap pages, the applicant stated that he had been informed by someone whom he knew that the victim had paid him the informer $500 to kill the appellant, the applicant's girlfriend and their child. But this friend also said that he was prepared to kill the victim instead. The applicant also related that he had other confirmatory information. As he viewed this threat upon his life as serious indeed, he borrowed a gun from another friend of his, one "Solgie." For some time subsequently he remained undecided as to his course of action. But that changed when he saw the deceased in conversation with another man, both of whom were scrutinizing him. That was in Mandeville. On his return home, someone confided to him that the deceased had been in Mandeville threatening to kill him. On the night of the murder "Solgie" took him to Heartease. He explained that he went to his victim's home saw when he emerged through the back door and shot him. The deceased cried out - "Velma mi dead." He discharged five other rounds.

Plainly, if the jury accepted the contents as true, they were entirely at liberty to act upon it. The slain man's girlfriend gave evidence at the trial. She testified to the fact that the deceased had gone outside to have a bath, had been shot and had cried out - "lawd God, mi dead now!" After the autopsy, the pathologist handed over a fragment to the police.

The learned trial judge held a trial within a trial to determine the voluntariness of the statement. His decision was made the ground of appeal argued (i.e. ground 1). That ground is in these terms:

> "1. The learned Trial Judge failed to take into account the discrepancies in the Crown's case arising from the evidence of the Crown witness in the voir dire and thereby misdirected himself in arriving at his decision that the caution statement was given voluntarily."

Mr. Darby identified two areas of discrepancy in the evidence of the two police officers who gave evidence on the "voir dire," viz, Detective Inspector Cowan and Detective Corporal Wiltshire. The areas related to (i) the presence of the investigating officer, Detective Corporal Cuffe in the room where the interrogation took place and (ii) whether the investigating officer spoke to Detective Inspector Cowan in the course of his taking the statement. As to the first, while Cowan testified that Cuffe was present intermittently, the other officer said he was present throughout. With regard to the second area, while Cowan said there was no communication whatsoever, Wiltshire said to the contrary. He said that the learned trial judge ignored these important differences in the evidence which seriously affected the credit of the witnesses and eventually the decision at which he arrived.

In order to assess the materiality of these discrepancies, it is necessary to state that the basis of the objection to the admissibility of the cautioned statement was that the applicant had signed a number of blank sheets of paper because he had been beaten. The live issue before the learned trial judge was plainly, had the applicant been beaten. Who were present in the course of interrogation could be important. The two police witnesses differed on this aspect of the evidence but the applicant gave evidence. He agreed with the officer who stated that Detective Corporal Cuffe was present. There was a suggestion that this officer had participated in beating the applicant. In that situation, the disparity in evidence was of little significance. The second discrepancy identified by Mr. Darby related as we said before, to communication between investigating officer and the officer interrogating the applicant. This discrepancy in our view, relates to a peripheral matter. Since the trial judge could have so treated that discrepancy, it is also a matter of little moment.

The learned trial judge gave reasons for his ruling which appears at pp. 84-87. These demonstrate that he focused on the live issue which was before him. He examined the documents and said this at p. 86:

> "I have looked at the statement and I have seen the positions in which the signatures of the accused man appear on each page. He has admitted that he made those signatures, and it seems to me that the places where those signatures are on the different pages fit into the true pattern of the statement. On the face of it there is nothing to show that the signatures were made on a blank sheet of paper, having regard to what is written on the statement itself. In other words, at the end of the caution there is the accused signature and the signature of the Corporal who witnessed the signature of Williams. At the end of the request there are also the two signatures, and then the statement itself continues from the first page on to the second, third, fourth, and fifth, and then on the last page there is the signature of the accused man somewhere, roughly, in the middle of that page. Below that is the certificate that this statement was read back to the accused and he was told that he could alter or add anything to it, and the signature is made. The Sergeant said that it took him from 4.00 p.m. until 5.50 p.m., or 5.55 p.m. to write the statement. He had been at the police station from about 3.30; he got there about 3.30; he started interrogating the accused man from about 3.35, and this lasted for about 15 to 20 minutes, and the accused man volunteered to give a statement telling how everything went. It was then that he got this paper and started to write what the accused man dictated, and the only time he asked him any question was when the accused man said something that he did not understand, and to clear it up he asked the accused man what was meant, and then he put it in language that was easily readable. I reject the evidence of the accused man, firstly, that he did not give the statement and that he signed, he signed blank sheets of paper. I am satisfied and I feel sure that the evidence given by the two police officers is the

> "truth of what happened on that occasion, that this accused man voluntarily gave the statement and signed it in accordance with the --- in the same way that the Sergeant (he is now an Inspector) said he did; that it was witnessed by Detective Corporal Wiltshire. I am satisfied that the statement was not obtained by any oppression, that the accused man was not beaten in any way, and I rule that the statement is admissible in evidence."

We too have examined the statement and agree with his conclusion. It is as plain as plain can be that the applicant could not have signed blank sheets of paper as he swore, and so enabled the police officer to produce the document presented in court. If the learned judge was correct on the basis of his examination of the documents representing the cautioned statements as we think he was, then the conclusion at which he arrived was inevitable. So far as that ground of appeal is concerned, we do not think it has any merit.

Uncorroborated confessions have been the cause of disquiet in England especially after the case referred to as "the Birmingham Six." Articles have been written in legal journals on the subject. But it is not now the law either in this country or for that matter in England, that a trial judge must warn the jury of the danger of relying on the uncorroborated police evidence of a confession disputed by the accused.

In this country, some police officers ensure the presence of a Justice of the Peace to guarantee fairness but that has not dissuaded counsel from objecting to the admissibility of a confession on the ground of police third-degree measures against the accused. Nor is it unknown for the integrity of the Justice of the Peace to be called in question when the Justice of the Peace is under cross-examination. Judicial experience in this country has not shown miscarriages of justice as to warrant elevating "police confessions evidence" into a special genre of evidence.

At the present time, the trial judge is obliged to tell the jury that they must consider the circumstances under which the confession was taken and if they are in doubt on that question, they should resolve it in the accused's favour. Adding a warning as to the danger of relying on such evidence is to give an official seal of distrust in our police force. Because we are very conscious of official disquiet in England where a further appeal in this case is likely to be taken, we think we ought to make some comment, and consider the confession against that background.

In this case, the learned trial judge gave the jury adequate, proper and fair directions on this issue. He raised with them for their consideration, the defence stance that the police had induced the applicant by violent means to affix his signature to blank sheets of paper and thereafter a senior police officer had then produced the statement which they had for consideration. We do not think that even if a warning were given, the result would have been otherwise.

Even if we appear conservative in our approach to "reform," we considered whether there was corroboration using that to mean independent evidence linking the accused with the crime. The evidence of the arresting officer of an admission to him by the applicant, we ignored for these purposes. The result was that the Crown's case rested wholly on a confession which was disputed. We think, nonetheless, that in the circumstances of this case, the statement could not have been so drafted to allow the signatures (which were admittedly the applicant's) to fall where they did. We would add that this fact was clearly left for the jury's consideration.

The other matter to which counsel brought our attention, arises from his directions to the jury that they should endeavour to arrive at an agreement. The circumstances are these: the jury retired first at 5:50 p.m. and returned at 6:31 p.m. to say that they were unable to arrive at a unanimous verdict. We have

not been told why the jury thought they should return in that comparatively short space of time. The trial judge told them that he could not then take a verdict that was not unanimous but they should continue their deliberations and try to arrive at a unanimous verdict. They retired at 6:31 p.m. according to the transcript. But that could not be correct. The jury returned at 7:14 p.m. at the request of the trial judge who thought that he should have enquired of them what assistance, if any, he could give. They identified the only issue in the case, viz. the validity of the cautioned statement which was uncorroborated. The judge gave directions on corroboration which are consonant with the present law. He then gave directions to the jury in terms of those suggested by Lord Lane in **R. v. Watson** [1988] 1 All E.R. 897 at p. 903. But then he added these words in respect of which the complaint is made:

> "... but it would have meant that we would have wasted all this time. You are sensible people of this parish and I expect you to be able to collectively agree on a verdict one way or the other."

We wish to note that in this country unanimity is still required of a jury where the charge is murder. That is not the position in England today. However, at a time when unanimity was required there, the Walheim directions were sanctioned. **R. v. Walheim** [1952] 36 Cr. App. R. 167: and see **R. v. Creasy** [1955] 37 Cr. App. R. 179 at p. 180. Since 1967 majority verdicts were permissible and thereafter doubt was cast on the **Walheim** directions. The weight of authority since then is that the dissentient minority jury should not be pressured into changing their view. Having said that it is right to say that Lord Lane in **R. v. Watson** (supra) pointed out at p. 901 that the approval given to **Walheim** was misconceived.

We desire to say therefore that with the benefit of Lord Lane's views, the latter part of **Walheim** viz:

> "...it makes for great public inconvenience and expense if jurors cannot agree owing to the unwillingness of one of their number to listen to the arguments of the rest:"

should be avoided. The jury should be left severely alone to consider their verdict and instructions from the judge, for their return in order to ascertain if they need assistance are best avoided or only issued in exceptional circumstances. When the jury return, whenever that is, then the judge if they are not agreed, should give directions as suggested in R. v. Watson at p. 903.

The words underlined in the extract above are capable of suggesting public inconvenience but in the context in which those words were used, we do not think that there was any pressure on the dissenters to alter their views.

In the event, we are not persuaded that any good cause exists or has been shown for us to interfere. The application for leave to appeal is accordingly refused.