JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS. 166, 171, 181 OF 2004

BEFORE: THE HON. MR. JUSTICE COOKE, J.A.
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MISS JUSTICE SMITH, J.A. (Ag.)

REGINA V. DEVON ROBINSON
STAFFORD ANDERSON
RICARDO BECKFORD

Mr. Ravil Golding for the applicants Devon Robinson and Ricardo Beckford.

Mr. Glen Cruickshank, Q.C. for the applicant Stafford Anderson.

Miss Maxine Jackson for the Crown.

January 22 and 23, 2008

COOKE, J.A. (Oral Judgment)

1. On the 14th February, 2003 at about 9 a.m. a robbery took place at Krunches Pastries on Main Street, Ocho Rios in St. Ann. This robbery coincided with the arrival of a delivery truck driven by a Cornel Peart, who at the relevant time was inside the business establishment. Two men carried out the robbery in which cash, jewellery and cell phones were taken from various persons. Mr. Peart was relieved of money. One of the two robbers was armed with a

firearm. The robbers left in a waiting motor car. On that same day the police apprehended 5 men who were subsequently charged and indicted in respect of the robbery. Of these 5 persons one of them Ricardo Beckford, was indicted separately for illegal possession of firearm and ammunition. Their trial took place in the High Court Division of the Gun Court in St. Ann's Bay and subsequently in Kingston. The applicants Stafford Anderson and Devon Robinson were convicted on the 20th August 2004 in respect of the counts relevant to the robbery and Ricardo Beckford on two counts pertinent to which he was separately indicted.

2. The case against the applicant Anderson rested on two limbs; a confession statement and evidence of visual identification. As the complaint, in respect of the quality and treatment by learned trial judge, with regard to visual identification is common to the applicant Robinson, this aspect will be subject to subsequent scrutiny. The full force of the well known words of Lord Summer in **Ibrahim v. The King** [1914] AC 599, 609 – 610 remains undiminished. These are the words:

> "It has been established as a positive rule of English criminal law that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement, in the sense 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. The principle is as old as Lord Hale."

3. At the taking of the caution statement a Reverend Shaw was present in his capacity as a Justice of a Peace. This was in the night at about 9 p.m. on the 14th February 2003. It was the evidence of the applicant that he had been shot by the police in his left upper leg and beaten, his face had been battered – he had been kicked in the area of his right eye. This is the evidence of Shaw at page 120 of the transcript, lines 1 – 14.

> "A. ... I believe he had a very slight abrasion on his right eye somewhere along here.
>
> Q. Did you enquire how he got that abrasion, sir?
>
> A. No, sir.
>
> Q. Did you notice that, Mr. Anderson was nursing a gunshot injury to his upper left leg?
>
> A. Well, I don't know if it was a gunshot injury but I observed, it appears like a peace [sic] of stick had scratched him there or stick him there, it appears to me."

Then the transcript at page 122, lines 5 – 13 reveals the following:

> "Q. Did Mr. Anderson complain within your hearing of being in pain, sir?
>
> A. Yes, he said that too.
>
> Q. What exactly did he say, sir?
>
> A. He said, I am feeling pain, I want to go to hospital.
>
> Q. Did you say anything to Mr. Anderson after he said this, sir?
>
> A. The police replied to him. "As soon as I am finish with you [sic] will go to the hospital." "

Reverend Shaw was a witness called by the prosecution to demonstrate beyond reasonable doubt that the confession statement was entirely voluntary. It would seem that the learned trial judge paid scant attention, if at all, to the significance of Shaw's evidence in his determination of the critical issue of voluntariness. This is bourne out by the reasons which the learned trial judge gave for admitting the confession statement. This will be dealt with shortly. It is important to note that the exchange between Shaw and the applicant reproduced above, took place before the narrative in the caution statement begun.

4. The basis upon which the learned trial judge admitted the caution statement is to be found at page 147 lines 3 — 19 of the transcript. In response to counsel for the applicant submitting that the caution statement should be excluded the transcript records the following:

> "HIS LORDSHIP: No, there is evidence which he's given that, while the Justice of the Peace was there he dictated a statement and there is no evidence that any of these things you speak of were brought to the attention of the Justice of the Peace.
>
> MR. STEWART: That is correct, m'Lord.
>
> HIS LORDSHIP: Good, which makes it the time of his giving the statement voluntary.

MR. STEWART: Might it so please you.

HIS LORDSHIP: And he's not even saying that the police told him what to say. That he made any complaints to Justice of the Peace that he dictated to the Justice of the Peace that he was beaten by any police officer. In those circumstances this court will admit it as Exhibit 3, I think?"

5. The sole criterion in the determination of voluntariness as demonstrated by the words of the learned trial judge was the fact that the applicant never made any complaints to the Justice of the Peace that he was beaten by any police officer. This approach by the learned trial judge is at best quite superficial. The totality of the circumstances surrounding the taking of the confession statement must be brought into account. This would include the "slight abrasion on his right eye", the physical manifestation of the mark on the applicant's left leg in the area where he (the applicant) said he had been shot. Further the applicant said that some 6 months after he was shot he was eventually taken to a hospital, by which time the wound had been visited by maggots. As to this (being taken to the hospital) there was no evidence to the contrary. The evidence of Shaw particularly that the police in reply to the applicant's expression of feeling pain said: "as soon as I am finish with you [you] will go to the hospital" is telling. Mr. Cruickshank, Q.C. correctly submitted that those words were "a promise held out" to the applicant and therefore contravenes the guidelines for the admissibility of confession statements. We

are of the view that the approach of the learned trail judge was inadequate. Accordingly the basis on which the caution statement was admitted was wrong. Therefore there is merit in the complaint of the applicant Stafford Anderson in his supplemental ground 1 which reads:

> "That the Learned Trial Judge fell into error when he failed to take into consideration the physical condition of the Appellant [sic] Stafford Anderson and the promise that was held out to him when he made the Cautioned Statement and admitted it into evidence."

6. The court now turns its attention to the issue of visual identification on which the prosecution relied in respect to the applicants Anderson and Robinson. Cornel Peart at identification parades, identified both applicants as the two persons who perpetrated the robbery at Krunches Pastries. At the time of the trial he was living in the United States of America. He had given a statement to the police on the day of the robbery. The prosecution succeeded in putting into evidence that statement pursuant to Section 31D subsection C of the Evidence Amendment Act on the basis that it was not reasonably practical to have his appearance in court. To ground the application evidence was given by Michael Peart the father of Cornel. At the conclusion of his evidence no questions were asked of him by either counsel representing the applicants. There was no opposition to the application by the prosecution to have Cornel Peart's statement tendered into evidence. Mr. Golding submitted that both counsel who appeared for these applicants at the trial, were not sufficiently alert for they should have

objected to the statement being admitted into evidence as the necessary preconditions of admissibility had not been satisfied. There was a want of evidence to show that it was not reasonably practical to have Cornel Peart attend to give evidence. The burden of his submission is set out in the applicant's supplemental ground 2 which reads:

> "The Learned Trial Judge failed in his duty to ensure that the Appellant received a fair trial by admitting into evidence the witness statement of Cornel Peart when no bases in law was laid for the admission of the said statement."

7. It is now necessary to summarise the evidence of Michael Peart.

(i) Cornel Peart was living in the United States of America.

(ii) He left for the United States "after Easter last year" [That would be in 2003]

(iii) Cornel Peart's mother had filed for him to live in the United States. He had a job with a furniture company and was living in Miami.

(iv) Michael Peart was in regular contact with Cornel by telephone.

(v) Cornel took an early vacation in January (2004) and he will not be able to get any more vacation until next year 2005.

The thrust of Mr. Golding's submission is that the prosecution did not proffer any evidence of any effort(s) made to have Cornel Peart attend at the trial. He contended that whether or not it was reasonably practical for a witness to attend cannot be divorced from the efforts to have such witness attend. In other words it cannot be said that it was not reasonably practical for a witness to attend in the absence of taking steps to have him attend. We think that there is merit in

this submission. Technically, what Michael Peart said about Cornel not having any more vacation leave is hearsay. In any event even if that was true the prosecuting authorities should have tried to prevail upon Cornel Peart's employer to allow him the short time it would have necessitated giving evidence in court in respect of very serious offences.

8. It is true that in court the resolution of issues is by way of an adversarial contest. However, the presiding trial judge has an imperative and essential duty of ensuring that there is a fair trial according to law. Accordingly, the presiding trial judge has a duty, for examples, to see that the rules of evidence are not breached, that the correct procedural regime is followed, and that each party is given an adequate opportunity to present it's case. Further, as in this case the presiding judge has a duty to see that any statutory enactment is properly invoked. It cannot be all left up to the advocates. The fact that counsel, appearing for Anderson and Roberts, did not challenge the admissibility of the statement would not relieve the learned trial judge from exercising his mind to see that the statement of Cornel Peart ought to be admitted within the relevant statutory section. There is an indication on page 268 of the transcript that the learned trial judge did not give the requisite consideration to the criterion to be satisfied before the statement could be admissible. He said in his summing-up:

> "Now, in respect to the witness Peart, he did not give viva voce evidence before the Court. His evidence was adduced by way of the Evidence Act. The foundation being laid by his father. Michael, because he was absent from this island."

The statement of Cornel Peart contained the only evidence against Robinson. Now that the caution statement has been determined by this court as inadmissible that statement would also contain the only evidence against Anderson. We are of the view that there is merit in the supplemental ground 2 filed on behalf of Robinson concerning which Anderson has now become a beneficiary.

9. What has already been said indicates that applications for leave to appeal, which have been treated as the hearing of appeal on behalf of Anderson and Robinson, succeeds. Nonetheless, the court feels obliged to comment on the treatment of the identification evidence. Mr. Cruickshank, Q.C. submitted that the treatment by the learned trial judge of the identification evidence was in—adequate. It was—

(i) Firstly, the learned trial judge neither expressly warned himself nor demonstrated in his summing-up the caution that should be exercised in evaluating the contents of a statement when the giver of that statement has not been subject to cross-examination; where the tribunal of fact is denied the opportunity to assess the demeanor of that witness.

(ii) Secondly, there is a passage in his summing up which is quite perplexing. This is at pages 268-269 of the transcript. It reads:

> "What is important is, that the Court needs to, when looking at statements adduced in

> evidence, to see whether there is corroborating evidence for it, which could properly cause that statement, as it is, to be tested, and this Court found that Nadia Walker gave corroborating evidence of the statement relevant, cogent and this Court accepts it as reliable."

Nadia Walker was employed as the cashier at Krunches Pastries and was present at the time of the robbery. She went to the two identification parades at which Cornel Peart identified Anderson and Robinson. She did not point out either of them. It is impossible, therefore to comprehend how her evidence pertaining to the robbery can be said to corroborate the evidence of the statement of Cornel Peart.

(iii) Thirdly, the statement tendered in evidence was rather terse in respect of the adequacy of opportunity which Peart had to leave a lasting impression in his consciousness as to facial or other significant characteristics of the two men who effected the robbery. Regrettably the learned trial judge did not address his mind to this.

10. The application for leave to appeal in respect of Beckford is refused. This application is hopeless. He was taken from a bus at a petrol station at the intersection of the Fern Gully Road and the roundabout leading to Ocho Rios. A firearm containing ammunition was taken from his person. It was essentially a matter of the credibility of the police officers who gave evidence for the prosecution. The learned trial judge cannot be faulted in arriving at a verdict of guilty on the two counts which pertained to him alone. Beckford was convicted on counts 5 and 6 of the indictment. However, the record shows that he was

sentenced on counts 1 and 2. This is an error and the record should be amended to reflect the true position.

11. It is only left to be said that in respect of Anderson and Robinson their appeals are upheld. Their convictions are quashed and sentences set aside. A verdict and judgment of acquittal is entered for them both. In respect of Beckford, the application for leave to appeal is refused. His sentences are to commence on 20th November, 2004.