Privy Council Appeal No. 22 of 1999

Alexander von Starck *Appellant*

v.

The Queen *Respondent*

FROM

THE COURT OF APPEAL OF JAMAICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL,

Delivered the 28th February 2000

Present at the hearing:-

Lord Slynn of Hadley
Lord Mackay of Clashfern
Lord Nicholls of Birkenhead
Lord Hoffmann
Lord Clyde

*[Delivered by **Lord Clyde**]*

On Wednesday 2nd August 1995 the dead body of a woman named Michelle Kernoll was found in room 28 in the Sea Shell Hotel, Montego Bay, Jamaica. The appellant, who was German, was visiting Jamaica in July 1995. At some time in that month he had checked into that room and on Sunday 30th July he had been seen in company with Michelle Kernoll. Her death had been caused by a single stab wound to the left chest. Very strong force had been used, causing fractures of six ribs. On the evening of 3rd August Detective Corporal Smallhorne found the appellant at the Falmouth Resort Hotel. He was arrested and later charged with the murder of Michelle Kernoll. On 4th October 1996 the appellant was convicted of her murder.

The principal point in the appeal to their Lordships is whether the trial judge ought to have left the possibility of

a verdict of manslaughter to the jury. In order to understand how this point arises it is necessary to refer to three matters, all of which were before the jury. The first concerns what occurred when Detective Corporal Smallhorne found the appellant. Detective Corporal Smallhorne stated in evidence that when he identified himself to the appellant the latter said, "I have been waiting on you guys for the past few days" and then "I killed the lady at the Hotel". The detective then cautioned him. The appellant then stated, "I have a knife which I used to kill her" and handed to the detective a pouch which contained a knife and a little jar. The jar contained a white powdery substance which resembled cocaine. No tests were evidently carried out to confirm that it was in fact cocaine, or to analyse the quality of the drug. But both sides have proceeded upon the basis that it was cocaine and the point is not one of dispute. On handing over the pouch with the knife and the jar within it the appellant said, "Is the cocaine that caused me to do it". He explained that he had kept the knife because he wanted to kill himself. He also said "Please don't take me back to Sea Shell Hotel, it brings back terrible memories". The knife was later found to have blood upon it of the same blood group as that of the blood of the deceased.

The second matter concerns a statement made by the appellant at a police office later in the evening of 3rd August 1995. A challenge was made at the trial against the admission of this statement, but after a voir dire the judge ruled that the statement was voluntary and admissible in evidence. The statement clearly contained elements which were contrary to the appellant's interest and it was presumably on that account that the prosecution led the evidence of it. In this statement the appellant was recorded as having referred to events on the Sunday afternoon, but he was at the trial later to explain that that was a mistake and what he had said was "Monday" not "Sunday". He explained that Michelle had come to visit him and this was the third time that they had met. He said "we started to have a party and took drugs; we take it a long time". He said that she then slept and that later they "started to party again. The whole time I didn't stop taking drugs". The statement then recorded him as saying:-

> "After a few hours we both were high and then I don't know why, I suddenly have this knife in my hand and then I don't know what happened exactly, but I remember seeing her on the ground full of blood and I think she was dead. And then the only thing I want was to go away. I took the knife the police found in my bag with me because I wanted to kill myself."

Some support for his statement that Michelle had also been taking drugs was available in the discovery during the course of post mortem analysis of a toxic level of cocaine in her blood.

The third matter concerns the trial itself. The appellant did not give evidence but made an unsworn statement. In this he enlarged upon his activities after his arrival in Jamaica and his meetings with Michelle. As regards the Monday evening he said that he and Michelle had gone out with a man called Mark Simon to a discotheque. After a time Michelle left to return to the hotel. The appellant gave her his room key and asked her to leave it outside the door. Later Mark Simon left and some time after that the appellant returned to the hotel. He saw nobody lying in his bed and, being tired, went to sleep on it. An hour later he woke up needing to use the toilet. He then said:-

> "I stand up and saw what happened. The right bedside was full of blood at the side and Mitchell (sic) was lying at the floor. Everything was full of blood ... on her side and on her body. She had a big wound in her chest. She looked real terrible. I was shocked, upset and confused because I didn't know what happened. I was afraid also because I thought everybody would think I did it ..."

He then referred to his leaving the room taking a knife and a pouch with him. He went to stay at a guest house in Montego Bay and later booked in to the Falmouth Resort Hotel. He then pointed out that there were two mistakes in the caution statement; one was the reference to Sunday instead of Monday, the other was the reference to "after this we were both high". His unsworn statement then moved on to other matters and concluded with a passage in which he stated that on being arrested by Detective Smallhorne he had been accused of killing Michelle and

cutting off her left breast. The statement continued: "I said I didn't kill Michelle Kernoll and I said I didn't cut off her left breast. I have no reason at all to kill Michelle, we had plans and I love her a lot".

The first and the second of these three matters very plainly provided a basis for a possible conclusion that the appellant had killed Michelle but had done so under the influence of cocaine. As a matter of law it is not disputed that the voluntary consumption of drugs, as well as the voluntary consumption of alcohol, may operate so as to reduce the crime of murder to one of manslaughter on the ground that the intoxication was such that the accused would not have been able to form the specific intent to kill or commit grievous bodily harm. In the present case the statements made by the appellant on arrest and in his caution statement point strongly to a conclusion that while he had killed Michelle he was so far under the influence of the cocaine that he lacked the *mens rea* required for murder and accordingly should be convicted only of manslaughter. There thus was evidence before the jury, properly admitted in the trial and substantial in its weight, which the jury could accept and which called for a verdict of manslaughter. But the trial judge took the view that by his unsworn statement at the trial the appellant was saying that he had not killed Michelle, that that statement was inconsistent with the position disclosed in his earlier statements and that he had thereby "killed the cocaine issue". Towards the end of the summing-up he said of the defence of the use of cocaine "The defence is not before you and you should not consider it because he has killed it ...". And at the close of the summing-up he said "He is denying killing her, so he can't say that he might have killed her because of cocaine. He has killed it". The Court of Appeal held that the trial judge was correct in holding that the appellant had presented a defence which was inconsistent with the caution statement and was not obliged to leave the exculpatory part of his caution statement as an issue to be determined by the jury.

The Court of Appeal recognised the principle affirmed in *Reg. v. Duncan* (1981) 73 Cr.App.R. 359 that where a defendant has not given evidence the whole of a "mixed" statement, that is to say one which includes matter which is incriminating and also matter which is exculpatory, should

be admitted in evidence, if it is to be admitted at all. But on the basis of certain Jamaican decisions they considered that where an accused has made an unsworn statement at his trial in which he has denied making the earlier admissions and explanations and has set up an entirely different defence, he deprives himself of the benefit of the exculpatory aspects of the statements; the issue is then no longer that raised in the earlier statement but becomes that which is raised in the unsworn statement at trial. As it was put by Gordon J.Ag. in *Reg. v. Trevor Lawrence* (1989) 26 J.L.R. 273 at page 280:-

> "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."

In the earlier case of *Reg. v. McGann* (unreported), 30th May 1998; Court of Appeal of Jamaica (Supreme Court Criminal Appeal No. 70 of 1987) Kerr J.A. after reviewing certain earlier cases concluded that they indicated:-

> "... 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."

The trial judge in the present case had founded on a passage in an earlier judgment in *Reg. v. Prince* (unreported), 14th October 1985; Court of Appeal of Jamaica (Supreme Court Criminal Appeal No. 31 of 1983) quoted by Kerr J.A. in *McGann* as follows:-

> "Where, however, the defence not only fails to develop the issue but virtually kills it by raising a defence wholly incompatible with the exculpatory parts of the statement, then that issue is no longer a 'live one' meriting the jury's consideration."

Their Lordships find it unnecessary to determine whether the unsworn statement which the appellant gave at the trial was or was not inconsistent with his earlier statements to the effect that he had been acting under the influence of cocaine. It is sufficient to observe that a strong argument can be advanced that no significant inconsistency existed. It is, however, important to note two points. First, the appellant did not give evidence at the trial but only made an unsworn statement. It is well recognised that such a statement is significantly inferior to oral evidence (*Mills v. The Queen* [1995] 1 W.L.R. 511). Secondly, even in the unsworn statement he did not deny making the two earlier statements. On the contrary in pointing out the two errors in the transcript he could be taken as affirming that he had made the caution statement. So far as the content of the earlier statements was concerned it can at least be noticed that he did not in his unsworn statement expressly say that he had not killed Michelle. What he said was that he did not know what had happened. Nor did he state that he had not taken cocaine; that matter was simply not touched upon. But their Lordships consider that the appellant was well founded in complaining that the approach adopted by the trial judge and the Court of Appeal in the law applicable to the case was unsound and it is on that ground that their Lordships consider that the appeal should succeed. It was agreed that in that event it would be proper to substitute a verdict of manslaughter in place of that of murder.

The function and responsibility of the judge is greater and more onerous than the function and the responsibility of the counsel appearing for the prosecution and for the defence in a criminal trial. In particular counsel for a defendant may choose to present his case to the jury in the way which he considers best serves the interest of his client. The judge is required to put to the jury for their consideration in a fair and balanced manner the respective contentions which have been presented. But his responsibility does not end there. It is his responsibility

not only to see that the trial is conducted with all due regard to the principle of fairness, but to place before the jury all the possible conclusions which may be open to them on the evidence which has been presented in the trial whether or not they have all been canvassed by either of the parties in their submissions. It is the duty of the judge to secure that the overall interests of justice are served in the resolution of the matter and that the jury is enabled to reach a sound conclusion on the facts in light of a complete understanding of the law applicable to them. If the evidence is wholly incredible, or so tenuous or uncertain that no reasonable jury could reasonably accept it, then of course the judge is entitled to put it aside. The threshold of credibility in this context is, as was recognised in *Xavier v. The State* (unreported), 17th December 1998; Appeal No. 59 of 1997, a low one, and, as was also recognised in that case, it would only cause unnecessary confusion to leave to the jury a possibility which can be seen beyond reasonable doubt to be without substance. But if there is evidence on which a jury could reasonably come to a particular conclusion then there can be few circumstances, if any, in which the judge has no duty to put the possibility before the jury. For tactical reasons counsel for a defendant may not wish to enlarge upon, or even to mention, a possible conclusion which the jury would be entitled on the evidence to reach, in the fear that what he might see as a compromise conclusion would detract from a more stark choice between a conviction on a serious charge and an acquittal. But if there is evidence to support such a compromise verdict it is the duty of the judge to explain it to the jury and leave the choice to them. In *Xavier* the defence at trial was one of alibi. But it was observed by Lord Lloyd of Berwick in that case that "If accident was open on the evidence, then the judge ought to have left the jury with the alternative of manslaughter". In the present case the earlier statements together with their qualifications amply justified a conclusion of manslaughter and that alternative should have been left to the jury.

The approach adopted by the Court of Appeal restricts the judge's responsibility and the scope of the jury's considerations to the particular issues upon which the parties chose to found their submissions. Such a restriction is inconsistent with his duty to secure that a just result is obtained in the whole circumstances disclosed in

the evidence. The principle which was identified in *Lawrence* relates to a denial of the contents of the earlier mixed statement. In the present case it is by no means certain that the appellant denied the contents of his earlier statements. But even if he had, the principle, if it was correct, would operate to exclude from the consideration of the jury one of two inconsistent lines of defence for each of which there was evidence in support, such as an alibi and a plea of self-defence. That cannot be correct. The principle penalises a defendant who departs in his evidence from an account and explanation which he has earlier given in a way which seems to their Lordships to be contrary to the achieving of a just result. With reference in particular to what was said in *McGann* the issues in a criminal trial fall to be identified in light of the whole evidence led before the jury. An issue, such as a line of defence, may well be raised by the admission of a mixed statement. Nor is it easy to understand how an exculpatory part of a mixed statement can be excluded and still retain significance sufficient to emphasise the necessity for the prosecution to prove the essential ingredient in its case which the exculpatory element sought to qualify.

Before leaving this part of the appeal their Lordships would add that the problem in the present case was aggravated by the handling of the matter when it arose at the trial. Two aspects of this should be mentioned. First, it was raised on two occasions by the attorney for the appellant by way of intervention during the course of the summing-up. On each occasion there was discussion of the point in which the prosecution and the defence participated and on each occasion these discussions took place in the presence of the jury. Where a matter of such importance required to be argued and resolved it was undesirable for that to be managed with the jury present in court. Secondly, the judge having at first told the jury to forget about the issue of cocaine, thereafter told them that since the two statements, the caution statement and the unsworn statement at the trial, could not stand together, they would have to make up their minds which of them they were going to accept. Both the statements were there for their consideration. But on that approach it was very plainly his duty to direct them as to the consequences which would follow if they accepted the one or the other, and in particular if they accepted the earlier statement that

a verdict of manslaughter would be open. However at the closing part of the summing-up the judge then reverted to his earlier position that the matter of the use of cocaine was no longer a live issue. This inconsistency in the directions was at the least unfortunate.

Of the two further grounds of appeal which the appellant set out in his case, one, a criticism of the trial judge's direction on the element of *mens rea* in murder is of little moment and is in any event academic in light of the view which their Lordships have reached. The third and remaining ground raised a question regarding the rights of a suspected person to consult with an attorney. In the present case the appellant asked for an attorney before his caution statement was taken. Telephone calls were made to the offices of two attorneys but without success and the statement was then taken. However, a justice of the peace was called to witness the taking of the statement so that some safeguard was provided at least for the fairness of that process. On the generality of the matter it was not disputed that, as Lord Browne-Wilkinson affirmed in *Reg. v. Chief Constable of the Royal Ulster Constabulary, Ex parte Begley* [1997] 1 W.L.R. 1475, at p. 1479, there is no common law right to have a solicitor present at every interview with the police- regardless of the nature of the offence. But the question was raised by the appellant before their Lordships in the present appeal more particularly regarding the operation of the undoubted right of a suspect to have an opportunity to consult with his or her attorney before the interview. Their Lordships do not however consider that the present case provides an appropriate occasion to explore that point in any depth. It was not an aspect of the problem discussed by the Court of Appeal. The issue identified and considered by that court was whether the appellant had a right to have an attorney present during the taking of the caution statement. Furthermore, in the circumstances of the present case the caution statement provided part of the material to support the defence of manslaughter and that issue has now been determined in the appellant's favour. It thus becomes unnecessary to canvass the fairness or otherwise of the absence of an opportunity to consult an attorney prior to the giving of the statement. In addition to these considerations their Lordships were informed that steps are now being taken towards the making of arrangements for

duty counsel to be available to assist suspects in situations where legal advice is required. As matters presently stand it is sufficient to record that in the case of foreign nationals the provisions of Article 36 of the Vienna Convention on Consular Relations (1973) (Cmnd. 549), and in particular paragraph 1(b) of that Article, require to be observed. Beyond that their Lordships recognise that practical difficulties may arise at least at present in relation to the finding of attorneys immediately available to help and the implementation of the right of the accused may on occasion require to be open to restriction, subject always to the overriding necessity to secure that the accused is given a fair trial.

Their Lordships will humbly advise Her Majesty that the appeal should be allowed, that a conviction for manslaughter should be substituted for that of murder, and that the case be remitted to the Court of Appeal for sentence. The respondent must pay the appellant's costs in the Court of Appeal and before their Lordships' Board.