JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL 191/02

BEFORE: THE HON. MR. JUSTICE FORTE, P.
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE PANTON, J.A.

DELROY STEWART v R

Delano Harrison, Q.C. for the appellant

Bryan Sykes, Senior Deputy Director of Public Prosecutions
And Simone Wolfe, Crown Counsel for the Crown

22nd, 24th September and 8th October, 2003

PANTON, J.A.

1. On September 24, 2003, we granted the application for leave to appeal in this matter and treated the hearing of the application as the hearing of the appeal which we allowed. The conviction of capital murder was quashed and the sentence of death set aside. However, in the interests of justice, we ordered that there be a new trial.

2. The appellant was convicted and sentenced on September 24, 2002, in the Saint Catherine Circuit Court presided over by The Honourable Miss Justice Beckford, sitting with a jury of twelve persons. The offence giving rise to this conviction was committed on August 24, 2001. Kimone Lewis, aged 12 years,

was sent on an errand by her elder sister, Natasha McKenzie. They lived in the district of Rose Hall, Saint Catherine. Kimone Lewis failed to return home. A search was launched. It resulted in the gruesome find that night of Kimone's naked and mutilated body in bushes near to the community centre. She had been sexually assaulted and scalped. The complete right side of her face had no skin, just bones.

3. Dr. Ere Seshaiah who performed the post mortem examination on August 30, 2001, found an incised wound with sharp margins and stripping of soft tissues present in an area of 30 x 22 cms involving frontal, parietal, right temporal and right side of the face, as well as a stab wound 3cms x 1 cm on the front of the neck in the midline, 28 cms below the top of the head. The latter wound penetrated through the underlying tissues and entered the left side of the neck. The fifth and sixth cervical vertebrae were cut at their junction, and the left internal carotid artery was cut resulting in haemorrhage into the left side of the thoracic cavity. Death was due to these injuries to the head and neck. The doctor also found that there was a 2 x 1 cm tear in the posterior vaginal wall, indicating that sexual intercourse had taken place recently.

4. The prosecution's case rested on a cautioned statement given by the appellant to the police. In it, he said that he had seen the deceased pass by his kiln on the Friday morning. She called to him. On her return, a "deportee youth" named Orville emerged and at gunpoint ordered him, the appellant, to lift up the "informer girl" and take her into the bushes. He obeyed. Having done so, he

remained and watched while Orville raped the deceased. According to the statement, Orville not only hit the deceased in the back of the neck with his gun, but also stabbed her with a broken bottle. Orville, he said, threatened him and his entire family with death if he reported the matter to the police. In the statement, the appellant also professed the innocence of his brother Michael Elliott, with whom he was charged with this murder. The prosecution also produced evidence that Michael Elliott gave a cautioned statement to the police on September 3, 2001. A copy of this statement was served on the appellant and, on the following day, in the presence of his attorney-at-law, some questions were addressed by the police to him. Thereafter, the appellant volunteered to take the police to the scene of the murder in the district of Rose Hall. This, he did, and it was the very location at which the body of the deceased had been found earlier.

5. On the basis of the appellant's statement, the prosecution was in a position to contend therefore that the appellant facilitated and abetted the commission of the murder by forcibly placing the deceased in the charge of the man called Orville, and stood by able, ready and willing to give assistance to him, if necessary, in the performance of the criminal activities. This contention, if successful, would have resulted in the appellant being convicted of murder, as opposed to capital murder with which he was charged, on the basis that he would have been a participant but not the one who dealt the fatal blows. Section 2(2), of the Offences against The Person Act, as amended, is relevant.

6. In his defence, the appellant said on oath that he was forced at gunpoint to take the deceased to Orville, and to remain as an onlooker while Orville carried out the atrocities on her. He said also that Orville had threatened him and his family with death if he attempted to leave the scene. However, he eventually left the scene, went home and had his breakfast notwithstanding his knowledge that he had just witnessed the killing of the deceased. He made no alarm because he was afraid given the threats that Orville had made. He denied the suggestion made by counsel for the Crown that he had concocted "the part about Orville being there". The basis for this suggestion is unclear in view of the fact that the prosecution presented no evidence of how the deceased met her death, except for the evidence contained in the cautioned statement given by the appellant.

7. The appellant filed grounds of appeal alleging "unfair trial", "miscarriage of justice" and "insufficient evidence to warrant a conviction and sentence". Learned Queen's Counsel filed an amended ground of appeal and a supplementary ground of appeal. The amended ground reads:

> "That the learned trial judge failed to ensure that the applicant received a fair trial".

The supplementary ground reads:

> "The learned trial judge's direction, in which she left duress as a defence available to the applicant, effectively deprived him of the chance of an acquittal of capital murder and conviction of non-capital murder".

8. In his written and oral submissions, learned Queen's Counsel dealt with the amended ground under four distinct headings. His general submission was that the cumulative effect of the matters complained of was that the appellant was deprived of the substance of a fair trial. On the other hand, Mr. Sykes for the Crown contended that the summing up did not have the effect complained of by the defence.

9. ***Reference to a previous conviction***

The following passage in the appellant's cautioned statement was read to the jury:

> "After I was deh by my coal skill the said youth,Orville, the deportee youth, him start to boost up thing pon mi now because mi get sentence in rape...All right. Because me get sentence in rape me know 'bout the little girl killing".

Mr. Harrison submitted that it was incumbent on the appellant's attorney at the trial to apply for the immediate discharge of the jury on the basis of this reference to a previous conviction for rape. Seeing that this application was not made, it was Mr. Harrison's further submission that the learned judge should have invited submissions on the matter in the absence of the jury or to have discharged the jury on her own motion. The least the judge should have done, he contended, was to have warned the jury in very strong terms to disabuse their minds of that portion of the statement. This warning should have been given, he said, immediately after the statement had been read and also in the summing-up.

Mr. Sykes agreed that nowhere in the summing -up did the learned judge attempt to deal with this matter. However, it was his view that the reference to the previous conviction was not sufficient to vitiate the conviction. Notwithstanding that posture, he had no choice but to concede that it was possible that the jury would have held the rape conviction against the appellant.

10. In **McClymouth v. R**. (1995) 51 WIR 178, the appellant was charged with non-capital murder. The prosecution's case rested on the evidence of one eye-witness who, while being cross-examined, blurted out that this was not the first murder that the appellant had committed, and that the said defence counsel had defended him before. The trial judge warned the jury to disregard the disclosure of the appellant's bad character but said nothing about the comment on the character of his counsel. In determining the appeal in this matter this Court applied the law as stated in **R v. Weaver** (1967) 1 All ER 277, at 280:

> "The decision whether or not to discharge the jury is one for the discretion of the trial judge on the particular facts, and the court will not lightly interfere with the exercise of that discretion. When that has been said, it follows, as is repeated time and again, that every case depends on its own facts. As also has been said time and time again, it thus depends on the nature of what has been admitted into evidence and the circumstances in which it has been admitted what, looking at the case as a whole, is the correct course. It is very far from being the rule that, in every case, where something of this nature gets into evidence through inadvertence, the jury must be discharged".

Carey, J.A., in delivering the judgment of the Court (Carey, Forte, and Wolfe JJA), said at page 185 (a-d):

> "In the trial of any offence which carries with it a heavy mandatory sentence, scrupulous fairness, it seems to us, must be observed. We do not think the fact that the evidence was blurted out, perhaps because the witness had become exasperated by cross-examination, should count for naught. The impact of that revelation on the jury would, we feel, be no less serious or devastating. For completion, it is right to add that the trial judge warned the jury to disregard the disclosure of the appellant's bad character, but he did not refer to the implication on the character of his counsel who was not portrayed in a favourable light. With all respect to the judge who plainly took the view that the disclosures ought not to be blown up out of proportion and were nothing more than ill-considered remarks, it seems to us that he did not give much weight to the fact that the remarks introduced a degree of prejudice. The case depends wholly on the evidence of this witness and on the credit of that witness. It would call for a remarkable mental agility on the part of any juror to divorce from his mind (an exercise not to be imposed on any jury) that this credible witness had not said that the appellant was a repeat murderer. The appeal accordingly succeeds on this point".

11. In the instant case, the prosecution's case rests wholly on the evidence in the appellant's cautioned statement. The jury was instructed to give due consideration to this statement. The ideal situation would have been for the offending portion of the statement to be edited, seeing that there would not have been any lack of understanding in relation to the rest of the statement. That not having been done, it was imperative that the jury should have been instructed as to how they were to deal with the reference to the appellant having been previously convicted and sentenced for the offence of rape. This was particularly so when it is considered that the prosecution's case was to the effect

that the deceased was raped then murdered. It was therefore a serious lapse for the learned trial judge to have ignored the matter and not mention it at all during the summing-up. We are of the view that on this basis alone the conviction had to be quashed.

12. ***The description of the cautioned statement as a confession***

The second aspect of Mr. Harrison's complaint in relation to the amended ground challenged the learned judge's repeated reference to the cautioned statement as a confession. Mr. Sykes, after combing the transcript, said that the judge had not said that the appellant had admitted to guilt. True enough, the judge did not use those words. However, there can be no debate that the word "confession" means an admission of guilt. Whether one is speaking from the perspective of the ordinary dictionary meaning or from the legal understanding, the meaning is the same. That being so, it was misleading for the judge to have given the jury the impression that the appellant had admitted to the commission of capital murder. In our view, the appellant was gravely prejudiced by the repeated and imprecise use of the word.

13. ***Delivery of reasons for judgment in no case submission in the presence of the jury***

The third heading under which the amended ground was argued was in respect of the judge's delivery of her ruling on a no case submission in the presence of the jury. As said earlier, the appellant was charged jointly with Michael Elliott. After the appellant had presented and closed his defence, a no case submission was made on behalf of Elliott. Although the submission was

made in the absence of the jury, the learned judge gave her reasons for acceding to the submission in the presence and hearing of the jury. She said, in part:

> "The prosecution must satisfy certain elements of the offence. When I come to tell you about, ahm, about the other matter you will understand what I mean when I say element and all these in relation to the charge against Elliott have not been satisfied or enough of them have not been satisfied so that if I were to leave you to adjudicate on this matter it would not be safe to do so. The law says when this happens, I must, as a matter of law, remove such a case from your consideration. So that on that basis I am going to remove the case against the accused, Michael Elliott from your consideration". (page 338)

Further, at page 339 (lines 14-18), she said:

> "I did say it was Elliott I was dealing with because I am saying I am going to deal with it you couldn't expect me to be speaking in relation to the other accused".

Mr. Harrison submitted that this procedure was irregular and would have resulted in the jury forming the impression that the case against Elliott was weak whereas that against the appellant was strong. He relied on the judgment of the Privy Council in **Crosdale v. R**(1995) 46 WIR 278, particularly at page 286h to page 287a:

> "There is no reason why the jury should be privy to the judge's reasons for his decision. In order to avoid any risk of prejudice to the defendant the jury should not be present during the course of the judgment or be told what the judge's reasons were. If the judge rejects a submission of no case, the jury need know

> nothing about his decision. No explanation is required. If the judge rules in favour of such a submission on some charges but not on others, or rules in favour of it in respect of some defendants but not others, the jury inevitably will know about the decision. All the jury need be told by the judge is that he took his decision for legal reasons. Any further explanation will risk potential prejudice to a defendant or defendants".

14. The learned trial judge did not heed the advice of the Privy Council in **Crossdale**, a case from our own jurisdiction. That failure created the risk of "potential prejudice", especially when consideration is given to the fourth heading under which Mr. Harrison classified the amended ground.

15. ***The cautioned statement of the co-accused***

During the joint trial, the prosecution put in evidence a cautioned statement given by the co-accused Elliott. That statement placed the responsibility for the death of the deceased on the appellant. It gave an eye-witness account of the rape and murder. The major difference in that statement when compared with the statement given by the appellant is that whereas the appellant blamed Orville for the actual rape and death, the co-accused blamed the appellant. The learned judge gave the necessary directions to the jury as to the statement of the co-accused not being evidence against the appellant. However, in a situation where the co-accused was the brother of the appellant, it is difficult to see how the jury could have avoided the feeling that the evidence of the co-accused was intended for them to use in the determination of the case.

16. The only evidence that the Crown adduced as being against Michael Elliott was his cautioned statement. It is surprising that the prosecution chose to have a joint trial and to put this statement in evidence considering that it was quite obvious that it did not contain an iota of evidence against its maker. That being the position, that statement served no other purpose in the trial but to prejudice the minds of the jurors against the appellant. We do not believe that even the repeated warning by the judge would have been able to prevent this prejudice.

17. ***Conclusion***

In view of the strength of the arguments presented on the amended ground, there was no justification for considering the supplementary ground which, if successful, would have resulted in the guilty verdict being reduced to non-capital murder. We are satisfied for the reasons already stated that the appellant cannot be said to have received a fair trial. Accordingly, we made the order for a new trial.