J A M A I C A

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEALS
Nos. 86 and 87 of 1974

BEFORE: The Hon. President (Ag.)
The Hon. Mr. Justice Swaby, J.A.
The Hon. Mr. Justice Zacca, J.A. (Ag.)

VIVIAN TALBOT & ENSLEY KERR v. REGINA

R. Small for the applicant Talbot.

B. Macaulay, Q.C., for the Crown.

October 7, 1974

LUCKHOO, P. (Ag.):

On October 7, 1974, we granted the applicant Talbot's application for leave to appeal against convictions and sentences in this matter and treated the hearing of the application as the hearing of the appeal. We allowed the appeal quashing the convictions and setting aside the sentences. We refused the applicant Kerr's application for leave to appeal as we considered that his application was without merit. We promised to put our reasons for allowing Talbot's appeal in writing at a later date. This we now do.

The applicants Talbot and Kerr were jointly indicted on four counts. The first count charged them with shooting at Vanley McKenzie with intent to do him grievous bodily harm; the second with shooting at Gershwin Martin with a like intent; the third with the illegal possession of a fire-arm; and the fourth with the illegal possession of ammunition.

Both applicants were unrepresented by counsel at their trial in the Home Circuit Court. After a trial lasting three days they were, on May 8, 1974, found guilty on all counts and were each sentenced to imprisonment for 18 years at hard labour on the first two counts and to 10 years at hard labour on the third and fourth counts, all the sentences being ordered to run concurrently.

The case for the prosecution was to the following effect. Police constables McKenzie and Martin were on mobile patrol in a police radio car in the Wareika Hills area at about 11.30 a.m. on June 14, 1973. McKenzie was driving. As they drove along a dirt road known as Black Bush they observed a Yellow Cab taxi coming towards them. McKenzie's attention was attracted by the sight of a "rasta" man sitting in the back seat of the taxi. As the two vehicles got within a short distance of each other McKenzie was able to make out the "rasta" man as the applicant Kerr. The taxi's speed was increased. Thereupon McKenzie observed the muzzle of a shotgun coming up inside the taxi and he saw a head coming up also. The muzzle of the gun was pointed in McKenzie's direction. There was the sound of an explosion and the windshield of the police radio car was shattered in the direction where McKenzie was sitting. There was the sound of a second explosion and the windscreen was shattered in the direction in which Martin was sitting. The taxi then crashed into the front of the police car. McKenzie and Martin fired their service revolvers in the direction of the taxi and the fire was returned from that direction. The occupants of the taxi ran out of the taxi and one of them went behind a nearby column and fired at the policemen. According to McKenzie he recognised the applicant Talbot as one of the other men who ran out of the taxi while those men were making good their escape though he did not recognise him as the driver of the taxi. There was a conflict of evidence between McKenzie and Martin as to whether any of the latter men shot at them when making good their escape. Martin on the other hand identified the applicant Talbot, whom he said was known to him for about a month before

that time, as the driver of the taxi. Martin also identified the applicant Kerr as one of the occupants of the taxi. He testified that the applicant Kerr was known to him and others as "Dread". McKenzie and Martin searched the taxi and on the back seat found a •38 calibre Ivor Johnson revolver which contained four live cartridges as well as a bag containing 58 rounds of 12 gauge shotgun cartridges. Two cartridge shells were found on the floor of the taxi. When examined the body of the police radio car was found to have a number of bullet holes.

On July 24, 1974, McKenzie and Martin were in a police radio car at a stop sign where Elleston Road joins Windward Road and Victoria Avenue when they saw the applicant Kerr ride up to the stop sign on a bicycle. Apparently, Kerr observed the policemen and as a result rode back in the direction from whence he came. The policemen drove off after him and came upon Kerr on Wild Street. As the police car came alongside him Kerr abandoned his bicycle and was about to jump over a bridge into a gully when he was apprehended and taken to Vineyard Town Police Station.

Earlier, on June 23, 1974, the applicant Talbot was apprehended and brought to Vineyard Town Police Station in connection with this matter. After being cautioned the applicant Talbot wrote out a statement and signed it. The statement is as follows:

> "Last week Thursday, 14th June, 1973, at about eleven o'clock, I was at United Block Factory at Wareika Hill. I was leaving to my home when I saw three men, namely, Ralphy, Chucku and Dread, when Chucku say I must come and drive him or he is going to shoot me. I started to cry and I went with them and they showed me the car and gave me the key and told me to drive. When I started to drive at about one chain Dread told me to stop and the other two hopped in. Ralphy went in the house for the key of the car. After they hopped in with other long guns I started to drive and Dread showed me where to drive until we met upon a police car. I bent down and the shoot-out /started/. I sneaked out of the car and started to run. They ran behind me. I ran straight home and they ran on their way. When I bent down the car crashed into the police car. There were about two long guns and about three short ones. There was a bag with some shots in the back seat of the car I was driving. The three of them was shooting at the police in their car."

The defence for the applicant Talbot who gave evidence on oath was an alibi. He called a witness one Chin in support of his alibi. As the learned trial judge succinctly put it to the jury -

> "What he (Talbot) is saying in his defence first is: 'I do not know Kerr, he and I were never together on the 14th of June on Black Bush Road. I never knew Kerr until I met him at the preliminary examination at Half Way Tree?' Secondly, he is saying, 'I was at work at the block factory until 12.30 on the fourteenth of June, consequently I could not be taking any part in a shoot-out at eleven-thirty on the Black Bush Road. I was at work, I was never a party to the shoot-out.' Thirdly, he is saying 'I never made any statement at all to the police. I never made any admission at all that I was in the taxi on that day; wrong identity, wrong man. Whatever happened to the police, I am not that person', and he called Mr. Chin to support him."

The applicant Kerr's defence was also an alibi. He also called a witness in support of that defence. He denied that the circumstances under which he was apprehended by the policemen McKenzie and Martin were as they gave in evidence.

In so far as the applicant Kerr is concerned we are satisfied that the learned trial judge gave correct and adequate directions to the jury and that the finding of the jury and the sentences imposed on him cannot be successfully challenged.

With respect to the applicant Talbot it is clear that by their verdict the jury rejected the defence of alibi he advanced at the trial. No complaint can be made on this score for in that regard the learned trial judge's directions were full and fair. The learned trial judge, however, did not give any directions to the jury on the issue of duress which in our view clearly arose from the statement alleged to have been written by the applicant after caution and which was put in evidence by the prosecution. Mr. Macaulay for the Crown conceded that the learned trial judge's omission to direct the jury in this regard is fatal

but only for the reason that as the applicant was unrepresented by counsel at the trial there was cast on the trial judge a duty to give directions in this regard. We are unable to accede to this qualification. While it is true that reliance was placed by the Crown on such part of the applicant's written statement (assuming of course that the jury found that he did write the statement and did so voluntarily) as would support the prosecution's case identifying the applicant as one of the persons present in the taxi at the material time it was open to the jury, in the event of their rejecting the defence run at the trial, to determine whether or not the contents of the statement as a whole was consistent with the other evidence in the case and whether or not they believed that it was true. See R. v. Joseph Simpson (1974) Cr. App. No. 109/1973 (unreported) decided by this Court on February 22, 1974 and R. v. Vincent McFarquhar (1974) Cr. App. No. 94/1973 (unreported) decided by this Court on March 29, 1974. That the exculpatory portions of a statement made by an accused person to the police and put in evidence by the prosecution cannot be ignored even if the same differ materially from the defence run at the trial is clearly indicated in the decision of the Judicial Committee delivered by Lord Tucker in Chan Kau v. R. (1955) 1 All E.R. at p. 267 letters E - F -

> "This evidence (the appellant's sworn testimony) differed materially from a statement which the applicant had made to the police on July 23, 1953, which, even allowing for difficulties of language and translation, the jury might well have thought amounted to an admission by the applicant that he had knowingly joined in Mak Hei's party for the purpose of assisting in the attack. On a proper direction they might, accordingly, have altogether rejected the appellant's sworn testimony, but he was entitled to have his defence as given in evidence fairly put before the jury and it was the judge's duty to direct the jury on the law applicable to the case on that basis."

Again, Lord Tucker in delivering the opinion of the Judicial Committee in Bullard v. R. (1958) 42 Cr. App. R. at p. 5 said -

> "It has long been settled law that if on the evidence whether of the prosecution or of the defence, there is any evidence of provocation fit to be left to the jury, and whether or

> " not this issue has been specifically raised at the trial by counsel for the defence and whether or not the accused has said in terms that he was provoked, it is the duty of the judge, after a proper direction to leave it open to the jury to return a verdict of manslaughter if they are not satisfied beyond a reasonable doubt that the killing was unprovoked."

This passage from the opinion in Bullard v. R. was cited with approval in the English Court of Criminal Appeal in R. v. Porritt (1961) 3 All E.R. at p. 468 where it was pointed out that the leading case in England on that point is R. v. Hopper (1915) 2 K.B. 431. In R. v. Sparrow (1973) 2 All E.R. 129 there are two passages in the judgment of Lawton, L.J. which call for comment. The first appears at p. 132 -

> "The trial judge had a difficult task in summing up that part of the case which concerned the appellant. First, he had to try to get the jury to understand that the appellant's exculpatory statement to the police after arrest, which he had not verified in the witness box (italics mine) was not evidence of the facts in it save in so far as it contained admissions. Many lawyers find difficulty in grasping this principle of the law of evidence. What juries make of it is a matter of surmise, but the probabilities are that they make very little."

The second appears at p. 136 -

> "The interests of justice required that the trial judge should get the jury to understand that an exculpatory statement, unverified on oath, (italics mine) such as the appellant had made after arrest, was not evidence in so far as it contained admissions."

That a statement not made on oath is not evidence of the facts in it (save in so far as it contains admissions) is not open to doubt. However, this must not be confused with a situation where a statement not on oath is made by an accused person and admitted at the trial during the case for the prosecution or for the defence. The jury are entitled to give what weight they think fit to the contents of such a statement even though the statement is not evidence of the facts in it. It behoves the trial judge to give the appropriate directions to the jury on whatever "defences" might be raised by the contents of such a statement.

As to duress being a defence the following passage from the judgment of the British Caribbean Court of Appeal in Gomes v. R. (1962) 5 W.I.R. at p. 472 is apposite -

> "There can be no doubt that "duress" is a defence and that when there is sufficient evidence, as in this case, the burden is on the prosecution to satisfy the jury that the act of the appellant was a voluntary one and that the jury must be satisfied beyond reasonable doubt. Indeed the defence was raised. We think, however, that it is a misconception of the principle to state that the "prosecution must lead such evidence as would satisfy them (jury) that appellant did not act under duress". It may not be possible for the prosecution to lead such evidence in some circumstances but yet the jury may feel sure on the evidence adduced that duress is negatived. In the view of this court there is evidence in the case on which the minds of the jury may be agitated and from which a conclusion one way or the other may be drawn; it is for the jury upon being attracted to the salient features to determine whether the will of the appellant was overborne by the gunman."

See also the case of R. v. Gill (1963) 1 W.L.R. 841 a judgment of the English Court of Criminal Appeal in which the obiter dictum of Lord Goddard, C.J. in R. v. Steane (1947) K.B. at p. 1005 on the burden of proof when such an issue is raised is considered and explained. See also R. v. Bone (1968) 1 W.L.R. 983 and R. v. Hudson (1971) 2 W.L.R. 1047 judgments of the English Court of Appeal. Reference may also be made to Subramaniam v. Public Prosecutor (1956) 1 W.L.R. 965, where it was held by the Judicial Committee that the trial judge erred in ruling as inadmissible the evidence of conversations between the appellant and a third party on the ground that statements by the third party made in the course of such conversations, whether true or not, if believed by the appellant might have induced in him an apprehension of death if he did not do as he was told and would thus have afforded cogent evidence of duress.

Returning to the applicant's statement, he was asserting that while he was present in and driving the taxi at the time of the incident he was not doing so voluntary but was doing so under fear of death. If the jury accepted the truth of this assertion or had any reasonable doubt that this was so the appellant would be entitled to be acquitted on the indictment. There was nothing in the other

evidence adduced by the prosecution that was inconsistent with such an assertion. Had the jury been directed on this issue they may have come to the conclusion that the applicant Talbot was indeed acting under duress at all material times and in those circumstances the applicant Talbot would have been entitled to an acquittal. Such a result would follow even if the applicant were legally represented at the trial for the principle is one of general application.

For these reasons we granted the applicant Talbot's application for leave to appeal and allowed his appeal.