

Oncil Williams

Appellant

v.

The Queen

Respondent

FROM

THE COURT OF APPEAL OF JAMAICA

REASONS FOR REPORT OF THE LORDS OF THE
JUDICIAL COMMITTEE OF THE PRIVY COUNCIL,
OF THE 16th December 1997 Delivered the
18th December 1997

Present at the hearing:-

Lord Goff of Chieveley
Lord Slynn of Hadley
Lord Lloyd of Berwick
Lord Steyn
Lord Hope of Craighead

[Delivered by Lord Steyn]

On 15th February 1992 two men entered the house at 25 Rochester Avenue, St. Andrew, where Ainsworth McBean and his common law wife, Michelle Rhone, lived together with their two year old child. One of the intruders was armed with a revolver. The other man was unarmed. They demanded money. Ainsworth McBean said they had no money. Thereupon the armed man shot and mortally wounded Ainsworth McBean. He fired a second shot apparently to make sure that Ainsworth McBean was dead. The men then demanded money from Michelle Rhone. She pulled out a drawer in the bedroom spilling the contents which included \$3000 in cash. They grabbed the money and demanded more. Michelle Rhone said she had no more money. The robbers then left.

One of the robbers was George MacFarlane. He was the unarmed man. Michelle Rhone knew him. On 25th May 1993, and relying on the evidence of Michelle Rhone, a jury convicted George MacFarlane of non-capital murder. The judge sentenced him to life imprisonment. Michelle Rhone did not know the man who actually shot the deceased. But at an identification parade held on 15th November 1993 she identified the appellant as the gunman. The police then arrested and charged the appellant.

The appellant was tried by a judge and jury in January 1995. The prosecution case was entirely based on the evidence of Michelle Rhone. She was a teacher and apparently an impressive witness. The sole issue was whether she might have been mistaken. She was confident that she was not mistaken. But she only identified the appellant 21 months after the murder. And she agreed that the appellant was of unremarkable appearance.

During the course of the prosecution case police witnesses testified how the appellant on three separate occasions after the identification parade said that he was not involved. Counsel for the appellant cross-examined on the same basis.

That is how matters stood at the end of the prosecution case. The appellant elected to make an unsworn statement. He said:-

"Members of the jury, I would like to say, on that day, I can't remember where I was on that day but one thing for sure, I did not kill anybody, my Lord."

Counsel then made their closing speeches. It is probable, as counsel for the respondent concedes, that neither counsel in their speeches referred to the interpretation of the unsworn statement. They worked on the assumption that it meant that the appellant denied that he was involved in the murder or that he was present at the scene.

The judge then summed up. It was generally a careful and balanced summing up. But a new theory had occurred to the judge, namely that the unsworn statement properly interpreted might mean that the appellant denied murder but admitted his presence at the murder scene. The judge told the jury:-

"This defendant, Mr. Foreman and Members of the Jury, gave a very short defence. He said that on the day of this incident he couldn't remember where he was. One thing was sure he did not kill anybody. And that was it. That is the end of it. It's a short statement but I suggest to you it is pregnant with meaning. It is for you to interpret that statement that he made. What has he said? He has said he can't remember where he was on the day in question. He has not said he was not at Rochester Avenue, he has said I cannot remember where I was. What he is sure of he killed nobody. So what is he saying? He is saying it is possible that he could have been at Rochester Avenue that day but that he didn't kill anybody? Is that a possible interpretation? It is a matter for you.

Counsel for the defence has remarked that it is difficult for people to remember where they are, you know, on a particular day, if you are asked to remember a long time afterwards, and you may think that that is true. If I said to any of you, Members of the Jury, where were you on the 15th of February 1992, I will bet none. if any, of you could tell me where you were that day. I know I couldn't tell you where I was. But that is one thing. I can't tell you where I was, but if anybody suggested to me that I was in the presence, I was on a scene where a man was murdered I could tell you I was not there. You may think a person might not be able to tell you where he was but he can tell you where he was not. Well, in this case this defendant has not told you that he was not at Rochester Avenue, he has said I can't remember where I was. So, it is for you to interpret this statement and decide what it means."

This their Lordships will call the "first passage". The judge subsequently returned to the interpretation of the unsworn statement. The judge said to the jury:-

"I have already told you that it is for you to interpret this statement to decide what it means. If you think it means that he did not go to Rochester Avenue on the 15th of February, 1992, and did not kill anybody there, you must find him not guilty of this charge of capital murder. If you think he went to Rochester Avenue, but didn't kill anybody there, again you

should find him not guilty of this charge of capital murder. It is the prosecution's case not only that he went there but that he did the killing. That is what the prosecution is saying. The prosecution is saying it was done in the course of robbery which makes him guilty of capital murder. So I direct you that if you interpret it to mean, I will repeat, that he did not go to Rochester Avenue on that day and did not kill anybody, he's not guilty. If you think he went there but did not kill anybody, again your verdict should be not guilty. In other words, you could only find him guilty of this charge of capital murder if you believe and you are sure that he did go there and he did kill Ainsworth McBean; if you are sure that he was the man with the gun that day."

Their Lordships will call this the second passage.

Following the summing up the jury retired and after a retirement of 40 minutes they returned a verdict of guilty of capital murder. The appellant unsuccessfully appealed to the Court of Appeal of Jamaica. The principal ground of appeal now put forward on the appeal to the Privy Council was not advanced before the Court of Appeal or considered by the Court of Appeal.

Counsel for the appellant concentrated in his oral argument on the judge's observations on the interpretation of the appellant's unsworn statement as reflected in the first and second passages quoted from the summing up. His point is simple and straightforward. He says that in context the unsworn statement was not capable of being interpreted in the way put forward by the judge in the first passage. Relying on the appellant's consistent denials of any complicity in the events that led to the murder and the way in which the defence was conducted counsel submitted that the judge's interpretation was wholly unrealistic. More important, in his unsworn statement the appellant said that he could not remember where he was on that day. If he had been at the murder scene he would have remembered that. It follows as a matter of common sense that he did not intend to admit presence at the scene. Their Lordships are satisfied that these submissions are correct. There never was any basis for suggesting to the jury that the appellant might have intended to deny murder but not to deny presence at the scene. What the judge put to the jury as an arguable interpretation was in the context wholly insupportable.

Accepting that the first passage amounted to a misdirection counsel for the prosecution argued that any prejudice to the appellant was removed by the second passage. Unfortunately, this argument does not stand up to analysis. In the second passage the judge reminded the jury of what he had said earlier. Moreover, he then dwelt on the possible verdicts open to the jury. It was as counsel for the prosecution rightly emphasised a simple case: the appellant was guilty of capital murder as the gunman or he was innocent. But in discussing possible verdicts the judge found it necessary to discuss the possibility that the appellant was present at the scene but did not kill anybody. That possibility originated solely in the judge's insupportable misconstruction of the unsworn statement. Their Lordships do not think that the second passage cures the first passage. On the contrary, it reinforces the misinterpretation of the unsworn statement placed before the jury by the judge.

It remains to assess the potential impact of the judge's misdirection. It was said that the interpretation put forward by the judge in the first passage would not have occurred to a jury. That is no doubt right. But the fact that the judge put it forward as a feasible interpretation might have impressed the jury or some of them. If the suggestion that the appellant might not have intended to deny presence at the scene was correct, it powerfully supported a case dependant on a late identification by a single witness. Their Lordships are satisfied that the risk of the jury being unfairly prejudiced by the judge's comments was great. The judge's comments made it impossible for the appellant to receive the substance of a fair trial.

Their Lordships are compelled to conclude, and have accordingly humbly advised Her Majesty, that this appeal ought to be allowed, and the conviction and sentence quashed but that the matter ought to be remitted to the Court of Appeal to consider whether a retrial ought to be ordered.

