Privy Council Appeal No 37 of 2005

Ricardo Williams		*Appellant*
	v.	
The Queen		*Respondent*

FROM

THE COURT OF APPEAL OF JAMAICA

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

Delivered the 25th April 2006

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Present at the hearing:-

Lord Bingham of Cornhill
Lord Hoffmann
Lord Hope of Craighead
Lord Carswell
Lord Brown of Eaton-under-Heywood

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[Delivered by ***Lord Carswell****]*

1. The appellant, who was born on 2 July 1981 and is now 24 years of age, was on 6 November 2000 convicted, after a trial in the Circuit Court for the parish of Kingston before Reckord J and a jury, of the murder of Leslie Grant on 26 May 1994. He was sentenced on 9 November 2000 to imprisonment for life. His application for leave to appeal to the Court of Appeal was dismissed at the close of the hearing on 11 November 2001 and written reasons were given by the court on 7 November 2002. On 22 March

2005 special leave to appeal as a poor person was granted, the respondent's solicitors having consented in writing to the prayer of the petition.

2. The trial in 2000 was in fact a retrial. The appellant was first tried in February 1997, convicted of murder and sentenced to detention at the Governor-General's pleasure. He appealed to the Court of Appeal, which on 26 March 1999 allowed his appeal, set aside the conviction and ordered a retrial, on grounds to which their Lordships will return later in this judgment.

3. The prosecution case against the appellant was that on 26 May 1994, when he was aged 12 years, the appellant took part in the murder of Leslie Grant, otherwise called "Driver", at Seaview Gardens, Kingston, while the victim was lying underneath his motor vehicle carrying out repairs. The sole evidence adduced by the prosecution which connected the appellant with the offence consisted of two statements made while in police custody. The first was a statement in writing made on 11 July 1994, taken after caution and signed by the appellant in the presence of a police officer and a Justice of the Peace. The second was a brief response made to the caution administered by another police officer when he was putting the charge of murder to him. In both of these statements, the admissibility of which was challenged at trial, the appellant admitted taking part in the shooting of Mr Grant, but in the latter he alleged that he was acting under duress from another participant, an older youth known as "Booker T". He made an unsworn statement from the dock at trial, in which he repeated his account and enlarged upon the allegation of duress.

4. On 26 May 1994 police were called to Seaview Gardens, Kingston, where they found the dead body of Leslie Grant lying under a vehicle. He had been shot once in the head and had died from this wound. Detective Corporal McRae testified that he had searched from spent bullets and cartridge cases, but was unable to remember whether he had found any. The deceased was identified by his brother-in-law, who gave his proper name Leslie Grant but made no mention of his nickname "Driver", which was only brought out in the course of cross-examination by the appellant's counsel. DC McRae said that he received the information about the deceased's nickname from his wife, but Mrs Grant was not called as a witness.

5. No evidence was called by the Crown about the time or circumstances of the appellant's arrest. He himself stated in the *voir dire* that he was

arrested in Seaview Gardens on 10 July 1994 and taken to Halfway Tree police station to the ACID squad, where he was beaten and kicked. He spent the night there and was taken next morning to Hunts Bay police station, where he was again beaten. It was put to Detective Sergeant Ashman that he arrived at Hunts Bay at about 9.30 am, but the witness could only say that that time could be correct. The prosecution did not adduce any evidence about the appellant's stay in Hunts Bay station until late afternoon. The appellant said in the *voir dire* that he did not receive anything to eat while he was in the station and no evidence was called to contradict that. No attempt was made to contact his parents or any other adult on his behalf, nor was he advised of his right to speak to a lawyer.

6. Detective Corporal Ashman (who by the time of trial held the rank of Detective Sergeant) and Detective Corporal McRae were called into Detective Superintendent Gauze's room in Hunts Bay station and instructed to send for a Justice of the Peace. Mr Castell McCormack JP arrived in due course and, after introductions, went into another room with DS Ashman and the appellant. There DS Ashman told Mr McCormack that the appellant wished to give a story about a murder in Seaview Gardens. DS Ashman cautioned the appellant and then recorded a statement which the appellant made between 4.50 pm and 6 pm. The completed statement was read over to the appellant and he was offered an opportunity to amend it, then the appellant signed and dated the statement and DS Ashman and Mr McCormack countersigned it.

7. The body of the statement read as follows:

> "Me was in my bed when a woman name Miss Joy send me go buy two box of matterhorn over 'Nitty-Gritty'. When me a com back me see two of me friend, 'Booka Tea' and Richie, over Richie, over Richie yard and me stop and a play a game of ludo with them. Then 'Booka Tea' say him ago a shop go buy something. Me lef and go back over 'Falcon' go give the woman the matterhorn and come back.
>
> Me, 'Booka Tea' and Richie lef and go over 'Marlie' to a Indian woman and we come over back and we a talk. 'Booka Tea' then tell me say a dog come over pan him house top and a give him problems and if the dog come back de night, him want we fi beat him.

'Booka Tea' then said 'Driver' say him, 'Booka Tea', and Richie a plan fi lick off a man shop lock.

The next morning me ina the shop and me hear the shop man tell Vincent say him couldn't sleep in peace the night because due to some big block whe drop into the yard. The man fi the dog say a man tell him say some man a plan fi lick off him lock fi go in a him house go tief. That a 'Driver' say so.

'Driver' then go into him house and 'Booka Tea' puncture the car wheel. After 'Booka Tea' puncture the car, him come round to where me and Richie was. The three of us then walk go round the road. Somebody call 'Booka Tea' and him go whe and take bout fifteen minutes fi come back.

The three of us walk go round the road. When we go round the road, 'Booka Tea' go to him cousin, 'Daygo', fi a gun. 'Daygo' give him a black short gun call 'Spechie'. Then 'Booka Tea' say him ago kill 'Driver'. Him then ask Richie if him a go help him murder him and Richie say him no know.

The three a we then go round a 'Driver'. When we go round de, 'Driver' was under the car and 'Booka Tea' go up to the car, give him a shot in him head, because him de under the car. 'Booka Tea' then give me the gun and me shot him ina him head. Me then give Richie the gun and we run go back whe we did deh. As we reach back pan spot, we see 'Moony' come fi the gun and Richie give him the gun. Me then lef go back over my yard. A so it go."

8. There was then an unfilled gap in evidence about the appellant's detention until 14 July 1994, when he was cautioned and charged by DC McRae. When asked by the judge at trial to repeat the words used in the caution, McRae stated that he had said:

> "Do you wish to say anything whatever you say will be taken down in writing and may be given in evidence."

He did not on this account give the appellant the standard warning that he was not obliged to say anything. McRae stated that the appellant said in response

> "A 'Book-a-Tee' give me the gun fi shoot Driver, and if mi never dweet him would a shoot mi sah".

The word recorded as "dweet" appears to have meant "do it".

9. The appellant appealed against his conviction on the first trial, on the ground that the trial judge had failed to consider whether the confession statement had been made voluntarily. The Court of Appeal allowed his appeal on that ground and ordered a retrial. At the first trial the appellant made the case that the statement was not made by him but written down by the police and given to him to sign.

10. The second trial opened on 31 October 2000. At an early stage DC McRae was called and was asked about the appellant's response to the caution and charge on 14 July 1994. Defence counsel objected to the admissibility of the response. Without asking the jury to retire the judge asked him to give the words of the caution and asked him if he had threatened the appellant, made any offer or promise to him or induced him in any way to respond to him, to all of which the witness said that neither he nor anyone else had done any of those things. The judge then asked if the witness had noticed any injury on the appellant, to which DC McRae replied that he had not. Without further ado and without giving defence counsel the opportunity to call any evidence or make any submissions, the judge summarily stated that the objection was overruled and received evidence about the appellant's response.

11. Defence counsel put it to DC McRae that the appellant had then been 14 years old, and everyone at the trial appears to have gone on the assumption throughout the proceedings that that was correct, notwithstanding the fact that the appellant subsequently gave his then age as 18 and simple arithmetic would have revealed his true age in 1994 as having been 12 years. Under section 2 of the Juveniles Act he was therefore classed as a child in Jamaican law. The mistake did not appear until the stage of sentencing, when no one appears to have adverted to its significance for the purposes of criminal liability.

12. The judge held a *voir dire* into the admissibility of the appellant's written statement, but did not follow the procedure approved in *Mitchell v The Queen* [1998] AC 695, 704 as the appropriate way to proceed. Defence counsel had already indicated that he would be challenging evidence, clearly

referring in the context (Record, p 17) to the confession statement. Notwithstanding this, he did not ask the judge to hold a *voir dire* in the absence of the jury nor did the judge commence one until the evidence of DS Ashman had proceeded some distance. By that time the jury had been made fully aware that a statement had been made by the appellant and that his counsel was challenging its admissibility on the ground that it was not voluntary. Their Lordships must repeat what they have said in previous appeals, that it is desirable that the jury should not hear discussion about a challenge to a statement which will be the subject of a *voir dire*, still less the about the grounds on which such challenge will be based.

13. When the *voir dire* did get under way, DS Ashman described the manner in which the statement was taken and stated in answer to questions from the judge that he saw nothing untoward or unusual about the appellant, who was comfortable and did not seem to be distressed. He did not ask for any refreshment or request the presence of any member of his family. Mr McCormack said that he had asked the appellant if he was threatened, beaten or anything, to which he said that he was doing it of his own free will. He made no complaint at any stage, no one made any threats or promised him any favours, and he appeared to be in a calm mood. Mr McCormack said in cross-examination that he had asked the appellant how he became involved in the incident, to which he replied that "Booker T" and "Richie" ordered him to do it. This remark did not find its way into the written statement recorded by DS Ashman.

14. The appellant gave evidence in the *voir dire*, in which he described being beaten and kicked by police officers at and after his arrest and again the next day at Hunts Bay station. He said then "I get so fed up and meck up a story", in which he told them that "'Booker T' did juck mi with a gun" and "him say anything him say mi fi doh, I fi dweet". The appellant's counsel asked him if what he said in the statement was true, to which he replied that it was, but he gave the statement because he was afraid of the beating.

15. Defence counsel then made submissions to the judge on the admissibility of the statement, focusing in particular on the requirements relating to young persons contained in the Administrative Directions annexed to the Judges' Rules. He encapsulated his submissions in a series of succinct and apposite propositions:

"(1) there is no evidence from the crown as to the circumstances in which the accused man was brought to the police station;

(2) there is no evidence from the crown as to what was said or done in anything to the accused man while he was in Mr Gauze's office;

(3) the accused was a juvenile;

(4) there is no evidence of any effort being made to contact either his parents or his guardian;

(5) there is evidence that leads to the conclusion that from 9.30am in the morning to 6.00pm, the accused was not given anything to eat or drink;

(6) the accused man gave sworn evidence which the crown is not able to rebut because of failure to lead vital evidence on this aspect;

(7) the most senior police officer in whose presence the accused was found, has not given any evidence before the court;

(8) the burden of proving voluntariness rests on the crown and the burden is beyond a reasonable doubt.

In all those circumstances as I have led, either as a matter of law or as a matter of judicial discretion, the statement ought not to be admitted. And finally, for the purpose of this voir dire, the contents of the statement are immaterial."

16. In the course of counsel's submissions the judge made at page 128 of the Record a remarkable observation, which appears in the following exchange:

"HIS LORDSHIP: In the voir dire Mr. Delisser? I understand you are asserting that the statement purported to be given by the accused man was not voluntary. So, I would think therefore, since you are the person who is asserting that there is a burden on you to . . .

MR. DELISSER: The law does not . . .

HIS LORDSHIP: We are not trying the accused on the issue, we are dealing with the issue of an admission as to a caution statement.

MR. DELISSER: Yes.

HIS LORDSHIP: And you have alleged, and the principle of he who alleges must prove must apply."

Defence counsel attempted to correct this misapprehension on the judge's part, but the judge repeated his opinion at page 135:

"HIS LORDSHIP: Mr Delisser, every criminal case lies on the prosecution and it never shifts. But the issue on the voire dire, it is my opinion, if this is so, the defendant is challenging because we have evidence in the trial, both Sergeant Ashman and the Justice of the Peace said as far as they are concerned nothing ontoward took place and that the young man gave a voluntary statement; this is their evidence. And this is evidence of the prosecution in an effort to prove it was voluntary. But now we are on the issue because you have challenged it on that issue. It is my view that a burden lies upon the accused man."

17. Defence counsel returned a little later to the task of convincing the judge of his error, and was supported by Crown counsel, who confirmed at the outset of her submissions that the burden was on the Crown to prove beyond reasonable doubt that the statement was voluntarily given by the appellant. The judge made no further comment either way on the issue. Notwithstanding the cogency of defence counsel's arguments, at the end of the submissions he gave a summary ruling:

"On the evidence before me, I have no doubt that the statement was taken, that it was given voluntarily, and the accused man admits that it is true what he said, and although he did give evidence that he was so badly beaten - you have by some fifteen men - I don't believe that.

MR. DELISSER: He never said fifteen, he said he was beaten