JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL 83/00

COR: THE HON. MR. JUSTICE FORTE, P.
THE HON. MR. JUSTICE WALKER, J.A.
THE HON. MR. JUSTICE LANGRIN, J.A.

R. V. STEVEN PALMER

Berthan Macaulay, Q.C. with Akia Adaramaja for the applicant

Paula Llewellyn, Senior Deputy Director of Public Prosecutions & Tanya Lobban for the Crown

February 12, 13, 14 & April 6 2001

FORTE, P.:

In the early morning of 27th March 1999, the bodies of the deceased Tamara Vanhorne and her 5 year old son were found at their home. The body of Miss Vanhorne was clad only in a blue knitted sweater, and was bleeding at the neck. Her son, Desroy James was lying on the bed on his back. He was bleeding from his neck and face. Delroy Salmon, the common law husband of Miss Vanhorne had left home for a party at about 10.30 p.m. on the previous night. On receiving a message he rushed home, to see a crowd of persons there, and the police inside his house. He described the scene when he entered – Miss Vanhorne and Desroy both dead – and "the room blood up." At

[a post mortem done on the 1st April, 1999 Desroy was found to have multiple lacerations. The injuries were as follows:

1. A 12 cm long laceration in the parietal area.

2. A 5 cm laceration above the left ear lobe, deep through to the skull bone.

3. A 'U' shaped laceration approximately 18 cm across the upper aspect of the neck, and partially through the cervical spine.

The neck was almost severed. The cause of death was exsanguination, loss of blood secondary to the laceration to the neck. Death was immediate.

Tamara Vanhorne had received eleven "chops," nine of which were severe. The doctor described the injuries as follows:

> A horizontal laceration 11cm above the right ear lobe deep to the bone but not entering the skull cavity.
>
> A 5 cm laceration to the right parietal area, deep to subcutaneous tissues of the scalp.
>
> A 4.5 cm laceration across and through the lower aspect of the right ear lobe, deep subcutaneous tissue.
>
> A 6.5 cm laceration, 1.5 cm below the right ear lobe.
>
> A 3 cm deep to the subcutaneous (fatty tissue) posterior to the right mandible.
>
> A 3.5 cm deep laceration – ½ centimeter below the jaw.
>
> A 4.5 cm laceration across the right occipito temporal region deep to the scalp.
>
> A U-shaped laceration about 20 cm long, just below the left mandible. This wound was deep through the soft tissue structures of the upper neck, but not all the way to the bone. It went through to the muscles, through to blood vessels and through to the wind pipe. The neck would be 'hanging' because it only had one muscle to hold up the neck.

There were two superficial lacerations at the right eyebrow and another superficial laceration to both hands across the fingers at the back of the hands mainly.

The deceased was found to have been pregnant at the time of her death. The cause of death in the doctor's opinion was exsanguination - an acute loss of blood i.e. sudden loss of blood due to the multiple lacerations.

The applicant was tried and convicted of these murders on the 28th March 2000, and on the basis of section 3 (1A) (b) of the Offences against the Person Act, sentenced to death. He now applies for leave to appeal his convictions. The evidence against him rested substantially on a caution statement, which the prosecution maintained he gave to the police on the very morning of the discovery of the bodies. However, before addressing the issues which have arisen in the application as a result of that statement, some of the other evidence in the case must be recorded.

The applicant lived at the time, about a chain from the home of the deceased. On the morning of the incident two witnesses Sidonie Washington, the aunt of the applicant, and her son Garnette were awakened by noise coming from the street. They spoke of seeing people running in the street, and of their going to the home of the deceased where they observed the dead bodies in the room of Delroy Salmon.

On returning home, they both noticed a trail of blood from their gateway leading into the premises where the applicant also lived. They followed the trail of blood to the steps of the applicant's room where they also observed blood on the door lock and on the wall. They called to him and he answered from inside saying he was in bed. Asked how the blood got on the door, he spoke of having received a cut the week before and said that that was how the blood got on the door. They again followed the trail of blood, which took them to the back of the yard and to the pit latrine. There they saw blood in the pit toilet on the floor and on the door. As a result, Garnette again asked the applicant about the cut on his hand. The applicant then gave a different story. He said some boys had held him up and asked him for "Shyon" and when he told them that he

didn't know where Shyon was, they got into a fight. He cut one of the boys and "they" chopped him on his hand. The applicant did not report the incident to the police.

Later that morning, responding to information received, the police went to the premises of the applicant, and apart from observing the trails of blood seen by the two witnesses, found the applicant in his room cleaning bloodstains from the floor and wall of the room. He was bleeding from a wound to his right palm. The police took from the applicant, boots and a pair of pants both of which appeared to have bloodstains on them. The police also went to the pit latrine from where they took several articles of clothing – all bloodstained. Asked by the police, how he got the cut on his hand, the applicant said three men held him up, robbed him and chopped him. Before going to the home of the applicant the police had been to the home of the deceased. Det. Sgt Bernard described the position of the bodies, and testified to having removed from the room, a pair of green ladies panties, a black handle knife, and a blood-stained machete.

In his defence, the applicant made an unsworn statement in which he stated as follows:

> "On the 26th of March, Friday night your Honour about 12:00 p.m. I get ganged up by a group of guys. I was going to buy some weed, your Honour. Couple of guys did stab me already. You have one rush me wid a machete, your Honour. I get ah cut from one of them. – right palm. Go back to my home, your Honour, going to my room. I hear a whole heap of noise. I hear like some noise out ah mi door, your Honour. Out on de road, your Honour. Goh out, a whole heap of people. Tell me somebody get killed up de road. Goh up there, you Honour, and I look. Come back down to my house, your Honour.
> Couple of hours, I see police came on the scene down there. So, dey start interrogating, questioning, ask me how me come by the chop. Seh he don't – he don't wants to hear nothing from me, your Honour. Then your Honour, I go back into my room, your Honour, because I bleed by my hand. I wiping off blood off my hands.
> Mr. Bernard and two other policemen take me to the Montego Bay Station. Interrogate in C.I.B. office, das dey need statement from me, your Honour. Only ting I tell –

> the only way I get chop. Didn't know nothing about de murder.
> Read me my right, your Honour, because – like right to get J.P. or aunt, one family dem. Mr. Bernard called me, tell bring my aunt. My aunt sit. Tell her 'Okay, you get outside.' Me and dem wi talk.
> Sit in deh like three hours. Me sit in there talk. I did not answer no questions what dem ah talk to me about, like about murder, your Lordship. Talking to me about de – 'bout whatsoever. Didn't question, ask me about wound and how you get my chop. Tell you, your Honour, they don't hear nothing about that.
> Mr. Bernard hold my finger and twist it. Box me left ears, sir. Couple hours – tek me to the hospital, your Honour. Come back, question me again. Tell me dey are going to detain me on suspect of murder and wound with intent Richard.
> Take you to the station, lock me up, your Honour. I nuh know – don't know nothing more. I just know that I come into court. Don't have nothing further." [Emphasis added]

Contrasted with this unsworn statement , is the caution statement allegedly given by the applicant and upon which the prosecution to a large extent relied. In that statement, the applicant is recorded as saying:

> "Yesterday, Friday me smoke a lot of drugs up till night.
> Me weng down ah mi house. Really I still me weng want piece ah tobacco, so me seh me ah goh check mi brethren, Cheyanne, down him yard. Me goh down Cheyanne yard and me knock pon de door and he woman seh, 'Ah who dat?' Me seh, 'Yes, ah me Nico.'
> Me she, 'Weh 'B' deh?' And she seh, 'Him nuh deh 'bout yah now.' Me seh, 'You alone deh 'bout yah' and she seh, 'Yes."
> How you nuh gone pan de dance.' Me ask her seh how she nuh gone pan de and same time mi look pan her and me seh, 'See if you find a tobacco soh gimme piece and she seh, 'None nuh deh yah.' Said time me look pan her and seh, 'Yuh ah one little idiot gal. Yuh nuh waan look fe de ting gimme,' and she seh, 'Yuh a wha? Likkle suck p.... boy.'
> Same time me box her. Same time she tek de machete from behind de door - and behind the door and chop me. Afterwards, me and her start wrassle wid de machete. And after a while me just start fe chap her, star. Me chap her up. Me just use de machete and cut de little boy throat after dat. Me just left de machete same place and goh down ah me yard.

> When me goh down ah mi yard – goh down ah mi yard, mi clothes dem weng blood up and me tek dem off and throw dem in de toilet. Me goh in mi room goh laid down and after a while me hear some excitement out pon the road. Mi cousin see de blood trail pon de step and ask me weh blood come from and me tell him seh ah man hold me up and did chop me. After me tell him wha gwaun, him seh me better make a report. And me seh to dem, 'Better oonu gwaun,' and dem lef and come back wid Mr. Bernard – come back wid Mr. Bernard.
> When Mr. Bernard come ah mi yard, we weng ah wipe out de blood out ah me room. Bernard hold me and mi brother and de other police, dem tek out the exhibit out de toilet. Ah deh soh everything done. From deh soh, to de station."

Before us Mr. Macaulay argued several grounds of appeal, some of which were without merit and are not deserving of mention in this judgment. The first ground to be argued and which was numbered eight among the grounds reads as follows:

> "The trial Judge stopped a witness from giving evidence in support of the Defence that the witness did not sign what the judge called the confession statement, the crux of the Prosecution's case and therefore impeded the right of the accused to put his defence that he did not sign the caution statement."

The background to this complaint is the contention by the applicant throughout the trial that he did not give or sign the statement tendered by the prosecution as his cautioned statement. In the process of cross-examination, counsel for the applicant attempted to place a document before the witness, apparently purported to be signed by the applicant. Counsel did so, in an effort it seems, to invite the witness, the police officer who took the statement, to make some comparisons with the signature on the document and that, which appeared on the caution statement. Here is how the evidence unfolded:

"Q. Now, that paper that I asked them to hand to you?

A. Is purporting to be Mr. Palmer ...

Q. Him just sign it, right?

A. Yes, sir.

Q. You look at the Caution Statement?

> **HIS LORDSHIP**: Mr. Ho-Lyn, I have to stop you here, you know. This is self-serving. What you showing him now is something purporting to be Mr. Palmer's signature.
>
> **MR. HO-LYN**: I am going to ask him about the signature itself.
>
> **HIS LORDSHIP**: I don't think I can properly do that, you know. Notwithstanding the accused wrote. He can write anything.
>
> **MR. HO-LYN**: We are going to come to that as well.
>
> **HIS LORDSHIP**: Let us hear the question."

It is clear that up to this stage, the learned trial judge had made no definitive ruling in the matter and was content to allow counsel to proceed in the manner in which he was going and to thereafter determine whether the process would be allowed. The recorded evidence continued thus:

> "Q. I want you to look at the Caution Statement.
>
> A. Yes.
>
> Q. The Caution Statement signature of Mr. Palmer, it is written in what you call cursive?
>
> A. Yes.
>
> Q. Join up?
>
> A. Yes.
>
> Q. In fact, it is the signature of a person who – well, no I can't ask you that now. As the judge said, the man can write anything him want. And it would be true to say that the document, the Caution Statement, the signatures are written differently?
>
> A.. Who I think will convince you that he writes both ways.
>
> Q. All right. You are sure – you are in effect saying he has written in different ways?
>
> A. Yes."

Later in cross-examination, counsel is allowed to ask the following without any interference from the learned trial judge:

"Q: ... I want you to look at this for me."

The notes record that document handed to witness and that witness examines document. Then:

"Q: Give me back the last one.

(Document handed to Attorney)

Again you would agree with me that he can sign more than one way?

A. More than two ways.

Q: More than two ways, but only on the Caution Statement is it written in a certain way?

A. Yes.

Q. And elsewhere it is written not in cursive then?

A. Shows you consistency.

Q: Shows consistency on the statement. Shows consistency on the statement. Fair enough. Let me suggest to you what is on the statement is not his signature? That is not how him sign him name?

A: I saw him write his signature there, sir and there is it (indicating) I saw him do it. Quite positive about that."

And then later:

"Q: You said – I am saying that his signature, the way his signature appears on that Exhibit 1 and 2 is not how he signs his name at all? Not about when he was standing, you think you saw him sign. I am saying that is not how he signs?

A. That is the way he signs on the day of the 27th of March 1999."

This dialogue discloses that the intention of counsel for the defence was to challenge the officer's evidence that the applicant had in fact signed the caution statement. In furtherance of that, counsel was obviously allowed to show the witness other documents, purportedly signed by the applicant and invited the witness to say that the signature on the caution statement was different. The complaint that the learned trial judge inhibited this process by stopping counsel in his cross-examination, resulting in prejudice to the applicant's defence is unfounded and consequently is without merit.

In ground 6, the applicant complained that the learned trial judge "failed totally to direct the jury on the meaning of self-defence in law."

A direction on self-defence would naturally only arise if the applicant had raised it in his defence or if it arose on the prosecution's case. As the applicant in his unsworn statement denied any knowledge of the murder, self-defence did not arise from that source. It is to the caution statement that one has to look to determine whether he was at that time raising the question. For emphasis and convenience we set out the relevant portion of that statement in which he allegedly relates his confrontation with the female deceased. He had gone to her home, asked for her common law husband, and then for tobacco. When she said she had none he told her "Yuh ah one likkle idiot gal. Yuh nun waan look fe de ting gimme." She replied, "Yuh a wha? Likkle suck p.... boy."

Then the statement continues:

> "Same time me box her. Same time she tek de machete from behind de door - and behind the door and chop me. Afterwards, me and her start wrassle wid de machete. And after a while me just start fe chap her, star. Me chap her up. Me just use de machete and cut de little boy throat after dat."

This narrative discloses the following:

(1) The applicant was the first to offer violence by boxing the deceased;

(2) Although she armed herself with the machete, it could be said that she did so to defend herself from his initial attack upon her and which in her mind would continue; and
(3) The most important of all – the applicant had disarmed the deceased of the machete, and consequently was out of danger, when he inflicted the several injuries to the deceased's body and also that of her little son.

In those circumstances, self-defence could not avail the applicant even in respect of the killing of the female deceased let alone the young boy who played no part in the alleged altercation and was nevertheless the subject of violence as described by the applicant. Consequently, the learned trial judge was under no obligation to define "self-defence" to the jury. This ground must also fail.

I now turn to ground 7 as argued by learned counsel for the applicant . It reads as follows:

> "In dealing with the prosecution,(sic) the learned Trial Judge did so inadequately. First, he failed to read to the Jury the terms of Section 6 of the Offences against the Person Act, and second, he failed to point out the accused characteristic as the Jury might think would affect the grounds mentioned in the said section."

Mr. Macaulay quite correctly did not rely on the first part of this ground. However he invited the Court to say that because the applicant had said in his caution statement that he had been smoking drugs before going to the home of the deceased, the learned trial judge was obliged to direct the jury that in determining whether the applicant was provoked they should assess him on the basis of how a person affected by drugs would react in the particular circumstances. Here is how the learned trial judge dealt with the issue of provocation in that regard:

> "Now what is provocation? Provocation is some act or series of acts done or words spoken which caused in the accused a sudden and temporary loss of self control which would cause a reasonable person to lose his self control and behave in the way the accused did. First you have to consider 2 questions, whether or not the act caused him to

> lose his self control by she boxing him and telling him those words, would it cause him to lose his self control and secondly if that act could cause him to lose self-control as he did, could those words cause a reasonable person to behave in the way he did. As to that second question, take into account everything said and done according to the effect in your opinion it could have on a reasonable man – a reasonable man having the power of control, the effect of an ordinary person, sex and age of the accused, because the prosecution must make you feel sure that the accused was not so provoked."

There was no evidence that the applicant was affected by the drugs he said he was smoking, and in fact in the caution statement, he never sought to excuse his conduct on that account. Except for mistakingly accrediting the deceased with having boxed the applicant, a factor which would be favourable to the applicant, the learned trial judge gave adequate directions on provocation, and in our view was correct in not making an issue in respect of the applicant's smoking of drugs, when the applicant himself did no such thing.

In any event, if the jury were to conclude that the applicant had been smoking drugs, it would be expected that some evidence would be made available to them in order that a proper assessment as to its effect on the applicant be made, as also how a person who had so imbibed, would be expected to re-act to the provocation allegedly offered by the deceased. In any event, the learned trial judge did invite the jury to assess the effect the provocative words "could have on a reasonable man having the power of control," which would have directed the jury to a consideration of how that reasonable man in the same position as the applicant would have re-acted to the provocation. In the event, this ground must also fail.

Before turning to other complaints made, it should be pointed out, that the learned trial judge did address the question of smoking drugs on the basis of lack of intent. He directed the jury thus:

> "Now, I am going to leave to you, Madam Foreman, that the accused man told you that he smokes a lot of drugs. You have to look at the intention of the accused. If you find that he was acting under drugs, if you figure he was not so provoked, not acting in self-defence, you have to consider whether or not he had the necessary intention to kill. Because if he was under the influence of drugs, you could consider manslaughter. Lack of the necessary intention to commit murder, that is, if you believe he was under the influence of drugs. Very well. So, that defence I leave to you."

It is evident that the learned trial judge examined very carefully with the jury, the caution statement, and invited them to consider the exculpatory aspects of that statement in determining whether the applicant was guilty of murder or manslaughter, the latter arising from those exculpatory parts of the statement. In those circumstances, there really can be no valid ground for complaining as to his treatment of the content of that statement.

In another ground, however, the applicant complained of the following direction given by the learned trial judge in respect of the caution statement.

> "If on the other hand you are sure of both, that it was made and it is true, then rely on it, even if he was forced to make it by oppression or otherwise. If you find that it was true, then you can accept it and use it."

The complaint arising from the above direction was that the learned trial judge in directing the jury thus, "was instructing them that they could convict on inadmissible evidence, even if he was wrong in admitting the evidence after a voire dire".

This contention is misconceived, as the admissibility of the statement was a matter for the learned trial judge, who had already admitted it. It could not therefore be classified as inadmissible evidence. It is settled law that once such a statement is admitted into evidence by a trial judge, then if the jury in considering the evidence comes to the conclusion that the statement was involuntarily given, then that conclusion goes to the weight they should give to the statement, and not to its admissibility. In determining

the merits of this complaint it is appropriate to put the above questioned direction in proper context. The passage complained of was in fact preceded by the following passage:

> "It is your job to decide two issues in relation to this caution statement or confession. You have to decide whether or not this accused man actually made it. If you are sure that he made it, you consider whether or not what he said in it is true. In determining that, you should take into consideration all the circumstances having regard to the allegations by him, that he never signed it, that is, he said his finger was twisted and he was boxed. If for whatever reason you are not sure whether the confession was made or it was true, then you have to disregard it, and look for other evidence, if there is any, before you can convict him."

The questioned passage follows immediately thereafter. Taken in context it is obvious that the learned trial judge's direction was correct. These directions have been approved by this Court in ***R. v. Rohan Taylor et al*** SCCA 50, 51,52 & 53/91 delivered 1st March 1993 (unreported) where in dealing with a similar complaint, Gordon, J.A. delivering the judgment of the Court said:

> "We cannot agree. The summing-up of the learned trial judge was in our view absolutely correct and unobjectionable for it followed settled principles and was a correct statement of the law. His directions were taken from Specimen Directions prepared at the request of the Judicial Studies Board of the U.K. and approved by the Lord Chief Justice in May 1987. See Archbold 42nd Edn. 15-29."

In coming to his own conclusion, Gordon, J.A. affirmed the words of this Court in ***R. v. Seymour Grant*** 23 WIR 132 in the following two passages from the judgment of Robinson, P:

> "Once the judge is of opinion that the statement was not obtained voluntarily it is his duty to reject it and, therefore, not to admit it in evidence whereas a jury may well, in the course of deciding what weight and value should be given to that statement, conclude that it was not a voluntary statement, but that nevertheless its contents were true and may confidently be acted upon."

and (2):

> "That (the jury's) opinion may well be that it was not a voluntary statement. But even if they so concluded that is not an end of the matter because voluntariness is not an absolute test of the truth of a statement. It may or may not be, depending on the circumstances, and they may well feel that although in their opinion it was not a voluntary statement that, nevertheless, its contents were true and may safely be acted upon."

Gordon, J.A. then concluded:

> "In our view once a statement is admitted in evidence, the jury is obliged to consider it. The truthfulness of the statement has to be determined by them even if it is admitted without challenge. If the voluntariness of the statement is challenged, the jury have to consider the fact of voluntariness and also the fact of truthfulness. Should they conclude that it was voluntarily given, that does not lead to an automatic rejection of it. They must reject it if they find that it was obtained involuntarily and it is not true or they entertain doubts as to its truthfulness. It is always their function to decide what weight or value should be given to a statement. If therefore, they find that the statement was involuntarily obtained, but they accept the contents as true and may safely be acted upon, then it is within their competence to so act."

The dicta of Gordon, J.A. and Robinson, P in the two cases cited, disclose the lack of merit in this ground. The learned trial judge must have been well aware of those judgments of this Court, in giving the direction which forms the subject of this ground and cannot be faulted. For those reasons this ground fails.

However, we make comment on another aspect in the determination of this complaint. The applicant, both on the voir dire and in his unsworn statement at trial denied that he had given the statement, and also that he had signed it. The issue therefore was not whether he was forced into giving the statement, but whether he gave it at all. In those circumstances, there would have been no need for a voir dire, the issue being left for the jury to decide whether he in fact made it: (See ***Adjodha v. The State*** [1981] A.C. 129). The misunderstanding appears to have arisen because the applicant

said that his finger was twisted and he was boxed, but the applicant never made any connection between these two acts of violence and the giving of the statement, instead denying that he made the statement. In our view, in all the circumstances, the direction on this point given by the learned trial judge was appropriate and adequate, dealing with all the possible conclusions that the jury could have gleaned from the evidence.

Mr. Macaulay also argued the following ground:

> "The learned Trial Judge wrongly treated the unsworn statement of the appellant as raising the defence of the Appellant (alibi) instead of treating it as no evidence at all, and failed to direct the Jury that they may only take it into account in their deliberations. In so directing the Jury, the 'defence' of self-defence was further removed from consideration by the Jury."

This is what the learned trial judge said:

> "Now, the statement that he has given is not evidence, is not evidence in the case. However, you have to give it what weight you think it deserves. You attach what weight you think it deserves, nothing less, nothing more.
> Now, what did he say in his statement. Basically what he is saying, is he knows nothing about this statement. The defence is really an alibi; his defence is one of alibi. The accused said he was not at the scene of the crime when it was committed. It is the prosecution, which has to prove his guilt so you are sure of it. He does not have to prove anything. On the contrary, the prosecution has to disprove his alibi. If you believe the evidence is false, the prosecution must still make you feel sure of his guilt."

Mr. Macaulay contended that an unsworn statement, is not evidence, and issues have to arise on evidence, and so the learned trial judge was wrong in directing the jury that the applicant was raising the defence of alibi. This ground is also without merit. Although the unsworn statement is not evidence, the jury is required to consider it and give to it whatever weight they think it deserves. If then, an alibi arises in the unsworn statement, the jury ought to be reminded of that, and directed that depending on the weight they give to it, they may well conclude that the content is true. Without examining the cited cases it is sufficient to say that the cases of ***Mills, Mills, Mills & Mills*** [1995] 46

WIR 240, and ***Oniel Williams*** SCCA 22/95 delivered 23rd February 1998 (unreported) do not contradict that proposition.

This complaint coming from the applicant is strange, in that he would, if his contentions are correct, have the learned trial judge omit to leave with the jury the defence which he sought to raise through his unsworn statement, but instead leave with them the account in the caution statement, which he had denied making. It is only the decision of the Judicial Committee of the Privy Council in ***Alexander von Starck v. The Queen*** Privy Council appeal No. 22/99 (unreported) that discourages more stringent criticism of this ground.

The application for leave to appeal is refused. The conviction and sentence affirmed.