JAMAICA

IN THE COURT OF APPEAL
SUPREME COURT CRIMINAL APPEAL NO. 23/92

COR: THE HON. MR. JUSTICE CAREY, P. (AG.)
THE HON. MR. JUSTICE GORDON, J.A.
THE HON. MR. JUSTICE PATTERSON, J.A. (AG.)

R. v. DELROY TOWNSEND

A. Manning for Appellant

L. Hibbert, Deputy Director of Public Prosecutions for Crown.

May 3 & 31, 1993

GORDON, J.A.

On February 14, 1992, in the Circuit Court Division o the Gun Court held at Mandeville in the parish of Manchester, the appellant was convicted for the murder of Eliza Crawford committed on 12th June, 1990, at Richmond, Bellretiro, in the parish of Manchester.

Before the trial commenced, Mr. Alonzo Manning who represented the appellant made a plea in bar by way of a demurrer. He submitted that the Crown's case depended solely on a cautioned statement allegedly given by the appellant. He contended that it was not voluntarily given, and even if it was admitted in evidence over the defence's objection, it did not establish a prima facie case against the appellant. The plea was denied and the trial commenced.

The Crown's case was presented by five witnesses but the core was the cautioned statement taken from the appellant by Detective Corporal Al Daley. On the night of 12th June, 1990 Mrs. Eliza Crawford was in her bedroom at Bellretiro, conversing with her daughter, Anita Crawford. There are two apartments at the home, each a bedroom. In the other bedroom, her daughter, Rose Ann and children were sleeping; the electric

light was on in that room. Anita heard sounds at a louvre window at the side of the other room. This was followed by an explosion and she saw smoke in the room in the area of the side window. Mrs. Crawford got out of bed, went to Rose Ann and awakened her. Rose Ann got out of bed, took a child with her and rushed under the bed in her mother's room. At this time Anita and the other children were under the same bed. Mrs. Crawford was on her way back to her room when another explosion was heard coming from the same window. She exclaimed, "Lord Jesus Christ, me dead now" and fell on the floor. The sound of the shot which felled Mrs. Crawford came three minutes after the first explosion and Rose Ann said she heard a voice which she did not recognize, outside the window from which that shot came, say "you f....., you dead now." The family remained huddled under the bed with the deceased lying on the floor in the other room for forty-five minutes. Then there was a knock on the door. They asked who sought entry and the applicant identified himself. He was told what had happened. The door was opened at his request and he entered the room where the body lay. He said, "They wicked eeh?" He was despatched to fetch the police; this he did and returned with them. Corporal Daley who led the police party observed that a blade in the louvre window was displaced, and a hole that appeared to have been made by the passage of a bullet was in the blade. He saw the deceased on the floor and recovered a bullet from the floor of the room near the body. Later while he was outside, his attention was drawn by District Constable "Speng" Miller to the presence of a gun by a tree under a cho-cho arbour. Later he heard a commotion, and on going to investigate, he saw the appellant surrounded by a hostile crowd who appeared bent on

physically assaulting him. He rescued the appellant from the crowd by placing his left arm around his neck and taking him to the police vehicle.

The appellant said to him, "mi wi talk to you, Mr. D." He cautioned him and the appellant said, "Mr. D. you know say me wi talk to you, mi only a go ask you noh fi send me go a prison." he took the appellant to the Mandeville police station and proceeded to record a cautioned statement from him. This is the statement:

> "Yes Mr. Daley, what I notice I have the firearm yesterday, mi take it from the storeroom. Mi get it when Inspector Reynolds open the storeroom door to make me put in the shot weh a exhibit in a Inspector Broomfield from Alligator Pond case in a di storeroom, because Mr. Cummings never deh yah and the exhibit store did lock. When Mr. Reynolds did a talk to you a di storeroom door and me put down the shot me take up the gun and put it under mi shirt and mi find two shot and put them in a mi pocket.
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> When mi goh a mi baby mother yard in the night I was circling the house on the outside. Mi have the firearm in mi hand because whole heap a thief in di area. I did a go towards round di kitchen because a round in a di kitchen them harbour all de while. Before mi reach de kitchen I buck mi foot on a rockstone and the gun go off and shoot Miss Eliza Crawford. A so frighten a didn't know weh mi is and then a come to myself and after that I take the gun and put it down and mi start to fear, mi mother-in-law get shot a nuh really purpose mi do and I couldn't explain to tell her daughter them what happen for mi 'fraid them quarrel on me. Me and Miss Eliza Crawford move very good. Me treat her good and everything I have me give her to look after mi two kids. I treat the old man very good too and a wouldn't look fe look on her and murder her like that. That is all that happen. I am so sorry. A nuh really purpose me do. That is the end a mi statement."

Immediately after this statement was recorded, the appellant was arrested by Corporal Daley and charged for the murder of Eliza Crawford; cautioned, he said nothing.

The appellant and Rose Ann Crawford had a visiting relationship which spanned four years and produced two children. He would at times sleep at Mrs. Crawford's home with Rose Ann and had offerred to establish a home for his family. The weight of evidence was that he enjoyed a very healthy and cordial relationship with Mrs. Crawford and regularly gave her money and articles for maintenance of the children. He was always welcome in the home. This was the evidence given by Rose Ann, supported in some measure by Anita. Anita, however, said that she had heard her mother express disquiet about the 'sweetheart' relationship that the appellant shared with Rose Ann. The prosecution sought to elevate this to the status of a motive in the appellant for the crime, but in our view that aim was not achieved.

The ballistic evidence given by Superintendent Rupert Linton identified the bullet found beside the body as being fired from the gun found on the premises. The gun was identified as a gun which had previously been submitted for ballistic examination and had been returned to the Mandeville Police Station from November 19, 1976. This firearm, the witness said, had a -

> "trigger block grip safety which is functional and can only be fired on double action if the trigger is fully pressed backward simultaneously with the pressing forward of the trigger block grip safety and in so doing disengaging the trigger block grip safety from the trigger."

The possibility of the gun being fired accidentally seems remote, he said. In answer to a question asked in cross-examination he said that the user of that firearm must be familiar with the safety features, it is made to prevent accidental firing. It can only be fired on double action and this required fourteen pounds pressure.

The bullet which killed Mrs. Crawford entered her body in the right scapular region, penetrated the chest cavity, macerated the super media sternum, lacerated the blood vessels of the heart and exited above the left collar bone. Death from hypoxia, Dr. Maille said, was immediate.

A no case submission was rejected and the appellant in a statement from the dock said that he was an exhibit clerk at Mandeville Police Station. He went to visit his baby mother on the night of the 12th June, 1990 and was informed that her mother had been killed by a gunman. He went to the Police Station at Mandeville and informed Detective Daley and he returned to the scene with the police. While there he saw District Constable Miller discharge a shot in the air and then throw the gun on the ground. Detective Daley ran to District Constable Miller, they spoke, then Detective Daley showed the appellant the gun. Detective Daley then placed his left arm around his neck and led him to the car. He told Detective Daley he did not have a firearm and had taken none from the police station. He denied that he killed his mother-in-law. He was taken to the police station at 7:00 a.m. and given a paper and told by Detective Daley that he was going to give him bail. He signed the paper and was charged for murder and placed in custody. He saw Detective Daley writing another paper and this paper was given to him and he was told to sign it five times, he did as he was told and Sergeant Walker was asked to witness it.

He next told of an incident which occurred at the Mandeville Police Station in 1986 when he was savagely beaten by Sergeant Errol Jackson. He had to be taken to the hospital for treatment. He then said that on March 14, 1974 while going to school in Kingston he was struck unconscious by a minivan and hospitalized.

Samuel Townsend, the appellant's father, told of the head injury his son received when he fell from a van in 1974 when on his way to school. He was unconscious in hospital until 7:00 p.m. that day (14/3/74), was sent home and returned regularly for treatment over a six-month period. Thereafter he went to the Children's Guidance Clinic. Thereafter he received treatment at Bellevue Hospital. In 1986, Delroy was treated at hospital for injuries he sustained at the police station. He was cut in the

head and bled from his ear and nostrils. He thereafter behaved oddly at times especially when the moon was full. He was hostile to the children in the house.

Dr. Gilbert Allen was the second witness called by the defence. He had examined the appellant on November 15, 1986 at his surgery in Mandeville. The injuries he saw could have been the result of an assault. Given the history of injuries he said "any damage to the brain that was superimposed upon previous damage could cause indirectly, aggravation of the symptoms of the old damage." He did not examine the patient for personality disorder. He saw nothing that led him to do a psychiatric examination. Someone who was around him daily would be better able to speak of the behaviour pattern of the appellant, he said.

The defence of the applicant was that he did not commit the crime. He suffered a head injury in 1974 and was traumatised by a severe beating administered by Sergeant Jackson at Mandeville in 1986. He was taken into custody by Detective Corporal Daley who promised him bail and gave him papers to sign and he signed. He never gave the cautioned statement.

Mr. Manning submitted that the learned trial judge ought to have accepted the submissions of the defence at the close of the prosecution case and ruled that there was no case for the appellant to answer. The cautioned statement at its highest established that the deceased's death was accidental. There was no mens rea proved.

His second ground of appeal was that the learned trial judge failed to put the defence of the appellant clearly and adequately to the jury.

His final ground "no jury properly directed would have convicted the accused man on the evidence of the prosecution," was subsumed under submissions that the verdict is unreasonable and cannot be supported having regard to the evidence.

Mr. Hibbert conceded that the evidence on which the prosecution relied came from the cautioned statement in which the appellant admitted firing the shot that killed Eliza Crawford. The summing-up of the learned trial judge, he submitted, was adequate and the verdict can only be disturbed if the Court can say that no reasonable jury properly directed could arrive at that verdict.

The trial judge in his charge to the jury gave directions on defences he gleaned from the evidence, viz. accident as raised in the cautioned statement, manslaughter in the doing of an unlawful act with lack of intent, diminished responsibility and finally alibi as raised in the unsworn statement of the appellant.

The directions on diminished responsibility were given immediately after murder had been defined by him and commenced with his reading to the jury the provisions of section 5 of the Offences against the Person Act. This was followed by the interpretation of the elements in the defence of diminished responsibility as is to be found in R.v.Byrne (1960) 44 Cr. App. R. 246 at p.252. He then told them their duty:

> "This question whether the accused at the time of the killing was suffering from an abnormality of mind, is a question for you Mr. Foreman and members of the jury. On this question, medical evidence is of importance. You the jury are entitled to take into consideraiton all the evidence including the acts and statement of the accused and his demeanour."

Later in his summation the trial judge referred to the defence of diminished responsibility in this context:

> "Now, as I understand the defence to this action is that I did not do it. The defence to the charge is that I did not do it, I was not present when it happened, I just came up by accident, came to the scene. That is the defence as he stated it from the dock. Calling of the witnesses by the defence, the doctor and the father of the accused, means they were setting up a defence of diminished responsibility, which I told you about already; that even

> "if you find the facts proved to establish a charge of murder, because of injury to his mind, then you should not find him guilty of murder, but guilty of manslaughter."

Was diminished responsibility raised by the defence? The learned trial judge in the extract above said that is what he interpreted the defence to have advanced. This was based on the statement of the appellant that he had sustained a head injury in 1974 which led to his having psychiatric treatment and the exacerbation of his condition by a beating administered in 1986. The appellant in this statement denied giving the cautioned statement on which the Crown relied. His defence was an alibi. The appellant's father gave evidence of the injuries the appellant sustained and his subsequent erratic behaviour sometimes hostile to children. The evidence of Dr. Allen was as to the physical injuries he saw subsequent to the assault the appellant suffered at the hands of Sergeant Jackson. Although he was specially trained in psychiatry, this doctor saw nothing in the appellant's condition or behaviour which called for psychiatric examination. The case was thus devoid of any evidence supportive of diminished responsibility in the appellant. The directions on diminished responsibility were thus misconceived and amount to a mis-direction.

The purpose of the medical evidence of the defence was in our view misinterpreted by the learned trial judge. The thrust of the appellant's statement from the dock was that he was promised bail and given a paper to sign and he signed it. He did not dictate it. Thus he was saying the "statement was not of my making, it was not voluntarily given." The evidence of his past injuries was given to support suggestions made that he was, as a result of these injuries, easily influenced. Detective Corporal Daley in cross-examination said the appellant was quiet, hard working and he obeyed orders: When he was giving the cautioned statement he spoke as he always did in a jumbled way and he appeared nervous.

The cautioned statement being the foundation of the Crown's case had therefore to be presented and explained to the jury by the trial judge in his summation with great care. He was required to explain to the jury that he having admitted it in evidence as being voluntarily made, it was their duty, in the light of the challenge to consider:

(a) whether it was voluntarily made,
(b) if it was true,
(c) what it meant, and
(d) what weight they should attach to it.

The most important consideration for them was the truth of the statement. If they found it was not true, or were in doubt about it and found the appellant signed because his easily suggestible mind led him to do it, then they should reject it and acquit the appellant. If they accepted the statement as true then, whether it was voluntarily given or not they had to determine what weight they attached to it. (see R. v. Seymour Grant 23 W.I.R. 132 and R. v. Rohan Taylor and Others S.C.C.A. 50, 51, 52, 53/91 (unreported) delivered March 1, 1993).

In his charge the trial judge told the jury:

> "The Crown produced a statement, which is called a cautioned statement, which was admitted in evidence and which you must give such a weight as you think fit."

He commenced a review of the cautioned statement and paused after he had dealt with the discharge of the firearm and said:

> "This is his story, you must believe whether that part is true. First you have to determine whether he gave that evidence and that it was voluntarily given. The fact that I rule that it was voluntarily given, don't mean you have to accept it hook, line, and sinker."

This represents the sum total of the directions given on this vital area of the prosecution case. While the language of fishing may be understood by a seafaring jury, we consider it particularly unhelpful to a jury in the hills of Manchester.

An aspect of the cautioned statement which called for an analysis by the learned trial judge was the mention of the area of Bellretiro being infested with thieves. The evidence of Anita and Rose Ann Crawford was that the area was peaceful and free of criminal activity. Detective Corporal Daley supported this by saying that in his years stationed at Mandeville, Bellretiro was a most peaceful and law abiding district. Why then would the appellant make this untrue statement? The learned trial judge had a duty to invite the jury to compare the cautioned statement with that made in court by the appellant. As judges of fact they had to determine the truth of the cautioned statement which in the aspect referred to above, contained an untruth. The evidence of Corporal Daley is that the appellant in giving the cautioned statement spoke in his usual jumbled manner. In speaking in court, did he speak in a jumbled manner? In examining the cautioned statement, was it given in a jumbled manner? These are some questions the jury had to determine and they ought to have been afforded some guidance by the trial judge.

The appellant said that he saw District Constable Miller discharge a shot from a gun then he threw it on the ground and Corporal Daley went to the District Constable and recovered the gun and showed the gun to the appellant. Evidence was led from Corporal Daley that District Constable Miller had access to the exhibit room in which the exhibit I was kept District Constable Miller was issued with a firearm and he knew how to use one. This exhibit, Superintendent Linton said, had to be fired by someone who knew how to use it because the possibility of it being fired accidentally was remote. The significance of this evidence was, regrettably, not explained to the jury.

The jury were not assisted by adequate instructions on how to approach their duty to evaluate the cautioned statement and the issues raised by the defence. The lack of adequate directions, we find, amount to a mis-direction.

In the light of these mis-directions, we find that the second ground of appeal succeeds. We therefore treat the hearing of the application as the hearing of the appeal and in the result, the appeal is allowed, the conviction quashed and the sentence set aside.

We have considered whether a new trial ought to be ordered. The cautioned statement is the entirety of the Crown's case. In our deliberations, we considered R. v.Linton Berry S.C.C.A. 69/88 delivered September 21, 1992, and the cases referred to in that judgment. In Reid v. R. 1978 27 W.I.R. 254 Lord Diplock gave examples of the factors that contribute to a consideration of whether or not a new trial should be ordered. He did not presume to exhaust all the factors that can arise: indeed that would have been impossible. One of the factors to be considered is the strength of the case presented by the prosecution. Another factor is that it is not in the interest of justice that the prosecution should be given another chance to cure evidential deficiencies in its case. The prosecution in this trial sought to cure an evidential deficiency by attempting to tender in evidence questions asked of and answers given by the appellant to clarify deficiencies in the cautioned statement. The application was refused. This rejection would not preclude another attempt being made to tender them, should there be another trial.

The charge against the appellant is a serious one and in balancing the factors for or against ordering a new trial, we are mindful of the fact that a criminal trial is an ordeal for the accused and we should not require the appellant to undergo this ordeal again unless the interest of justice requires it (see Au Pui-Kuen & A.G. of Hong Kong 1980 A.C. 351).

Rose Ann Crawford shared an intimate relationship with the appellant for over four years and she knew his voice. When he arrived at the home some forty-five minutes after the incident and rapped on the door, he identified himself. She recognized his voice, informed him of the tragedy that had occurred and opened the door to admit him. Rose Ann heard the attacker speak shortly after he shot her mother; the words he spoke were sufficiently distinct for her to hear and repeat them but she could not identify the voice. She said, it was a man's voice. A coarse voice. "I could hardly hear him, little bit because it don't talk loud." Had the voice been that of the appellant she would indubitably have recognized it. This is a fundamental weakness in the prosecution case which raises grave doubts about the strength of the case. We are not persuaded that a conviction is inevitable on the facts. We, therefore, enter a verdict and judgment of acquittal.