

IN THE CAYMAN ISLANDS COURT OF APPEAL

Criminal Appeals # 9 & 10 of 1996
Indictment # 16 of 1994

Between:

HER MAJESTY THE QUEEN

Respondent

- and -

ORAL GEORGE ROPER
STEVE GARSTON MANDERSON

Appellants

BEFORE: The Rt. Hon. Edward Zacca, President
The Rt. Hon. Telford Georges, Justice of Appeal
The Hon. Gerald Collett, Justice of Appeal

Mr. Delano Harrison & Mr. Neville Levy, instructed by Mssrs. Neville Levy & Associates for the Appellant Oral George Roper.
Mr. Howard Hamilton, Q.C. & Mr. Neville Levy, instructed by Mssrs. Neville Levy & Associates, for the Appellant Steve Garston Manderson.
The Hon. Solicitor General Samuel Bulgin & Miss Cheryl Richards for the Crown.

March 31, April 1, April 16, 1999; August 20, 1999

JUDGMENT

ZACCA P.

The appellants were charged with the murder of James Powell on the 11th January 1994 at Her Majesty's Prison, Northward, Grand Cayman. After a lengthy trial by Jury they were unanimously convicted for murder.

The Crown's case was that there was a common design by the two appellants to commit the offence of murder. On the 7th January 1994, prison officers entered cell number 4 at the Northward Prison. In this cell were the two appellants. A search was made in the cell and a yellow radio case containing some money was found in a locker. The appellants became angry and violent insisting that the prison officers leave the cell. After they left the cell the appellants barricaded the door of the cell with a bunk bed.

The appellants refused to come out of their cell and the prison officers were unable to enter the cell. This situation continued until 11th January 1994 when the prison officers decided to get the appellants out of the cell. Threats had been made by the appellants to the effect that they were going to kill a prison officer. These threats were repeated. The deceased was amongst the prison officers detailed to gain entry to the cell. He commenced cutting the bars the grill area of cell number 4 with an acetylene torch. The appellant used water from the toilet which they threw at the officers and the torch wet out. The toilet was made of ceramic material and the appellants began throwing out pieces of ceramic at the prison officers.

It was the appellants' case that the toilet bowl got broken, when one of them threw a vent screen which landed on the toilet. The deceased continued cutting the bars with the torch. The appellants continued attacking by throwing things at the prison officers. Whilst throwing the ceramics, the appellants again issued threats of killing a prison officer. Whilst the deceased was cutting, he suddenly moved away. It was the Crown's case that whilst the deceased was cutting at the bars, the appellant Manderson held a piece of the ceramic and pushed it towards the deceased's face thereby inflicting injury to his neck from which he later died. The deceased then moved away, and another prison officer started cutting at the cell door with the torch. It is alleged that the appellant Roper told this prison officer that he would be next. The cell door was cut away enabling the prison officers to enter the cell. At this time the appellants surrendered and the prison officers entered the cell and took the appellants into their custody. The toilet bowl in the cell had been smashed and several pieces of ceramic were lying on the ground.

Statements and interviews were recorded by the police from the appellants. These statements and interviews were tendered into evidence by the Crown. The appellants elected not to give evidence in their defence but called several witnesses. It was the case for each appellant that the injury to the deceased was not inflicted by either of them and they denied any responsibility for the death of the deceased. Each appellant relied on his recorded statement. One of the witnesses for the appellant, Onez Flores, a prison officer, stated under cross-examination that the situation was tense because both appellants were issuing threats about killing prison officers. He also stated that when the cutting of the bars was in operation, the appellants were still issuing threats about killing prison officers. They were also throwing pieces of ceramic from their cell towards the prison officers. However he never saw the appellant Manderson's hand go through the cell door and he never saw if anything happened to the deceased whilst he was at the door.

Another witness for the appellant, Michael Stephens, a prison officer, stated that he observed the deceased walking from the area of the operation and that he was holding the right side of his neck with his left hand and that he was bleeding a lot.

Dr. Royston Clifford, a forensic pathologist, attached to the Ministry of National Security and Justice in Jamaica, also gave evidence on behalf of the defence. He stated that the piece of ceramic could not have caused the deceased's injury.

This evidence was in conflict with the evidence of Dr. Obafunwa, a pathologist, called by the Crown. He, it was, who performed a post mortem on the body of the deceased. His opinion was that a piece of ceramic could have caused the injury to the deceased and that death was due to haemorrhagic shock

due to a stab wound to the neck. He also stated that the injury was not consistent with an object being thrown from the cell and striking the deceased.

Before this court counsel for the appellant Roper, Mr. Harrison, argued two grounds of appeal. These grounds related to both appellants. The grounds of appeal as filed were as follows:

- (1) “That in light of the fact that:
 - (a) the Appellants’ cautioned statements and recorded police interviews, tendered as part of the prosecution case, constituted “ mixed statements” and
 - (b) the Appellants gave no evidence in their defence, it was incumbent on the learned trial judge to have directed the jury that the statement and police interviews, including the excuses or explanations, must be considered in their entirety in determining where the truth lay.The learned trial judge default in this connection was a non-direction amounting to mis-direction, fatal to the Appellant’s conviction.
- (2) That, in his charge to the jury, the learned trial Judge failed to treat separately with the significance of each individual Appellant’s cautioned statement and police interviews with a view, particularly, to having “his exculpatory explanation fairly placed before the jury as part of his case”.
- (3) That, though he gave the jury general directions on the issue of evidential discrepancies, the learned trial judge afforded them no, or no adequate, particular assistance as respects the grave and irreconcilable discrepancy between the evidence of key prosecution witnesses as to how the deceased came to have received the fatal injury.
- (4) That the insertion of the cross-examination of material crown witness, DR. OBAFUNWA, during the course of the presentation of the defence case (a) constituted a material irregularity, and (b) necessitated careful directions to the jury as to how to treat it.
- (5) That under all the circumstances of the case, the Appellant’s conviction is unsafe or unsatisfactory”.

Mr. Harrison for appellant Roper, argued on behalf of both appellants with respect to grounds 1 and 2. Mr. Hamilton for appellant Manderson, adopted the submission of Mr. Harrison as they related to appellant Manderson. Grounds of appeal 3 – 5 were abandoned by both counsel.

Mr. Harrison's main submission was that the statements and interviews of both appellants were mixed statements, and the learned Judge failed adequately to deal with the statements in his directions to the jury. The trial judge, he submitted, should have dealt separately with the significance of each appellant's mixed statement, with a view to having the appellant's exculpatory statement fairly placed before the jury.

Another submission on behalf of appellant Roper was that the trial judge failed to direct the jury that a passage in Roper's statement indicated a withdrawal from any intent to injure anyone.

In his statement, Roper, is recorded as saying: -

“On throwing down the screen on the floor, it hit the toilet which caused the toilet to break in several pieces. My roommate then said, yeah, this is what we want oh be onto the man who pushes his head through the door. He picked a up a couple of pieces, I did the same. He went on top my bunk where I sleep, pelt piece outside towards where the officers was. Before he did that I yelled at him and told him not to throw it out there.” (My emphasis)

Although there was no specific ground of appeal with respect to this submission, Mr. Harrison was allowed to argue this matter within grounds 1 and 2.

It is not suggested that this formed part of the defence of Roper at the trial. His defence was that he was not involved, nor did he participate in any enterprise to kill or injure anyone. Appellant Roper did not give evidence at the trial.

Mr. Bulgin for the Crown submitted that the directions on common design were adequate, and that the unchallenged evidence is that there was continuous participation by appellant Roper, even after the deceased was injured.

The appellant Roper was not admitting that he was involved but later withdrew his participation. He was not resiling from any plan. This formed no part of his defence. It cannot now be argued that the trial judge failed to leave this aspect of the matter to the jury. See *D.P.P. v. Leary Walker (1974) 21 W.I.R. 406*.

If the trial judge had directed the jury as is being submitted by counsel for appellant Roper, this may have led the jury to believe that the appellant was saying that he was involved in a joint enterprise, but he later withdrew. When in fact the appellant's defence was that he was not involved, nor did he participate in any joint enterprise to kill or injure anyone.

We are of the view that this statement by appellant Roper was not a withdrawal from a joint enterprise. The totality of the evidence does not reflect any withdrawal without further participation.

We found therefore that the trial judge was not in error, having regard to all the circumstances, in failing to direct the jury that the appellant Roper was saying that he had withdrawn from a joint enterprise.

Mixed statements:

Are the statements, of appellants Manderson and Roper, to be classified as mixed statements? If they are, did the learned trial judge deal adequately with them? It is difficult to classify the appellant Roper's statement as a mixed statement. However, the statement of appellant Manderson does appear to include exculpatory and inculpatory statements. There is, however, no admission that he was responsible for the injury inflicted on the deceased.

In *R v. Aziz (1995) 3 All E.R. 149* the House of Lords held that both the inculpatory and exculpatory parts of a mixed statement made by a defendant were admissible as evidence of their truth in a criminal trial. This principle did not apply to wholly exculpatory and self serving statements by a defendant, which were not evidence of any fact asserted. However, when the defendant did not give evidence but relied on the exculpatory parts of a mixed statement, the judge was entitled to comment adversely on the quality of those parts of the statement which had not been tested by cross examination.

It is not being suggested that the trial judge in the present case commented adversely on the statements. What is being submitted is that he did not adequately deal with the contents of the statements.

See also *R. Bonner v R (1990-91) CILR, 272* Kerr J.A. at page 289 stated:

“In his speech in *R. V. Sharf*, Lord Havers (1988) 1 All E.R. at 673, quoted and reaffirmed the approval of the Court of Appeal the following statement of Lord Lane, C.J. in *R. v. Duncan* 73 CR. App. R. at 365:

“ Where a mixed statement is under consideration by the jury

in a case where the defendant has given evidence, it seems to us that the simplest, and, therefore, the method most likely to produce a just result, is for the jury to be told that whole statement, both the incriminatory facts and the excuses or explanations, must be considered by them in deciding where the truth lies. It is, to say the least, not helpful to try to explain to the jury that the exculpatory parts of the statement are something less than evidence of the facts they state. Equally, when appropriate, as it usually will be, the judge may, and should, point out that the incriminating parts are likely to be true (otherwise why say them?) whereas the excuses do not have the same weight. Now is there any reason, why, again where appropriate, the Judge should not comment in relation to the exculpatory remarks upon the election of the accused not to give evidence?"

It is necessary to see how the trial judge in his directions dealt with the statements.

At page 1921, line 3, the trial judge stated: -

"Now, on the other hand, the defence's case in a nutshell, both accused have pleaded not guilty. They both gave statements to the police. In those statements they are saying that neither of them caused the injury to the deceased and that they are in no way responsible for any injury that he suffered."

Although the appellants did not give evidence, the trial judge clearly told the jury that they should consider the statements of the appellants, in which they were stating their defence, that neither of them caused the injury to the deceased and that they were in no way responsible for any injury suffered by the deceased.

Again at page 1939, line 12 the trial judge said: -

"And you will also have to bear in mind when you come to consider the confession statement, because in those statements there are numerous allegations where the person who is making the statement is saying something against the other prisoner. Now whatever one prisoner in his statement says against the other prisoner is not evidence against the other. It is only what he says in his confession statement about himself that is evidence against him."

At page 1946, line 17.

“ You recall that there was no objection to the confession statement by counsel. I ruled that the statement was free and voluntary – the various statements and they were admitted in evidence. However, it is still a matter for you to determine the weight and the value you will attach to it. Those are matters for you to decide. You will decide what you will accept from it; whether you believe what is in it or not. Of course you will bear in mind that the confession statement has not been subject to cross-examination. But you will have to look at it and you will come to your own determination as to whether you believe what is in it, and the weight and value you attach to it. Those are all matters for your consideration.”

In dealing with the evidence of Detective Sergeant Marlon Bodden, the trial judge stated at page 2203:

“On 12th January, he attended Northward Prison to conduct enquiries and he spoke with defendant Roper and Manderson and present were his attorney, Mr. Steve McField and Detective Inspector Dennis Brady and Detective Superintendent Kenrick Hall.

He spoke about giving the usual warning and recording a statement from the accused Roper. I ruled that the statement was admissible and that statement was tendered in evidence and read to you.

Now, I don't propose, Mr. Foreman and members of the jury, to read through these statements. You have copies of them and the respective counsel when they addressed you, they dealt with those statements. The only thing I wish to emphasise so far as those statements are concerned is that the weight and value of those statements are matters for you. You will determine what you accept with regard to them, what you believe and what you don't believe, what you consider to be true and what you consider not to be true.”

At page 2204, line 9:

“I don't propose to go through reading these statements. This trial has dragged on long enough. You have copies of it and when you go to consider your verdict, you will look at it and you will come to your determination.”

From those directions it can be seen that the trial judge left not only the inculpatory parts of the statement but also the exculpatory parts. He left the entire statement for the consideration of the jury, without any adverse comments. He told them that it was a matter for them to decide what weight and

value they would attach to the statement. It cannot be said that the directions were in any way unfavourable to the appellants.

The appellants did not give evidence. Whether or not the statements were mixed statements, we find that the trial judge's directions were adequate and could not have caused any injustice to the appellants. The jury was given every opportunity to consider the statements in their entirety. They were given copies of the statements which had been read to them during the course of the trial.

The use of the word "confession" on various occasions in reference to the statements was most unfortunate. However, at the very outset of the summing up, the trial judge told the jury that the defence of the appellant as stated in their statements was that they did not cause the injury, nor were they in any way responsible for any injury which the deceased suffered. We do not feel that the jury would have understood the use of the word, "confession statement" as denoting an admission that the appellants were responsible for the injury to the deceased.

We do not believe that the use of the words, "confession statements" in any way affected the verdict of the jury.

In the circumstances we dismiss the appeal of each appellant and affirm the convictions and sentences.

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