IN THE CAYMAN ISLANDS COURT OF APPEAL

HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CICA (CRIMINAL) NO. 14 OF 1991

BEFORE: THE RT. HON. MR. JUSTICE EDWARD ZACCA PC., OJ., PRESIDENT

THE RT. HON. MR. JUSTICE P. TELFORD GEORGES, PC., JA

THE HON. MR. JUSTICE KENNETH C. HENRY, JA.

McANDY FORD THOMAS v. REGINA

Mr. Furniss for the Appellant

Mr. Michael Clarke for Crown.

On 6th April, 1994 and 11th August, 1994.

REASONS FOR JUDGMENT

On April 6, 1994, this appeal was dismissed. The conviction and sentence affirmed. We promised to put our reasons into writing. This we now do.

On March 9, 1990, two masked men entered the Gold Royale Jewellery Store on Goring Avenue with the intention of committing a robbery.

In the course of the robbery, Mr. Ratimir Pavlovic was shot and killed. A quantity of Jewellery was taken. Subsequently, some of the Jewellery was recovered.

The appellant and one Jerry Machado Christian were charged for murder arising out of the death of Ratimir Pavlovic.

The jury returned a verdict of manslaughter against Jerry Christian. However, the appellant was convicted of murder.

The Crown's case was that the two men were seen running from the

direction of the Jewellery Shop at about 3:15 p.m. Witnesses for the Crown deponed that at about that time they saw two men on a motor cycle, one of them being Jerry Christian. The evidence disclosed that the motor cycle had been rented by the appellant.

The masks were described as one being black and the other a red devil mask.

Two witnesses for the Crown, Ronald Leslie Wilson and Edward Whittaker stated that at about 3.00 p.m. they saw Jerry Christian and another man running from the direction of Goring Avenue. Soon after Whittaker went to the Gold Royale Jewellery Store on Goring Avenue where he saw a man lying in a pool of blood.

Both witnesses testified that they attended identification parades where the appellant was one of the men on the parade. Neither pointed out the appellant but both identified the appellant in the dock at the trial as being the man they saw with Christian. They stated that although they saw the appellant at the parade they did not point him out.

Both gave explanations as to why they did not point out the appellant on the parade. The first time the appellant was pointed out by the witnesses was when he was in the dock at the trial. More will be said about the identification of the appellant later.

The medical evidence disclosed that three bullets entered the body of the deceased. Two were removed from the body and one was recovered in the Gold Royale Store. The bullets removed from the body were handed over to the Police. Death was due to multiple gun shot wounds.

Det. Con. Mark Miller testified that at about 2.00 p.m. on March 9, 1994, he saw the appellant and Christian on a rented motor cycle. The rider was the appellant and Christian was the passenger.

with the assistance of Jerry Christian a gun was later recovered

and the evidence disclosed that the bullets removed from the body of the deceased were fired from that gun. Jerry Christian admitted that the gun belonged to him and when he and the appellant decided to go to the Jewellery Store, he handed over the gun to the appellant. The gun had no bullets in it.

In his evidence, Jerry Christian stated that he had no knowledge that there were any bullets in the gun and that it was the appellant who shot and killed the deceased.

As previously stated, the jury returned a verdict of manslaughter in respect of Christian.

The evidence against the appellant Thomas was threefold :

(1) He was seen by two witnesses along with Christian about the time of the robbery;

(2) The evidence of Jerry Christian who stated that it was the appellant who planned the robbery and that he handed the gun to the appellant prior to their gong to the Jewellery store. That it was the appellant who fired three shots at the deceased and that it was the appellant who killed the deceased;

(3) A statement made to Clyde Hylton Talbot, a Police Detective from Jamaica, who was placed in the cell with the appellant Thomas. In this statement, the appellant admits

being involved in the robbery at the Jewellery Store along with Christian. However, although admitting that he had the gun, he stated that when the deceased was coming towards him, he fired one shot in the air and that Christian grabbed the gun from him and fired three shots at the deceased, killing him.

Three main grounds of appeal were argued :

(1) The statement made to Detective Talbot by the appellant ought not to have been admitted in evidence;

(2) The learned trial Judge failed to give full and proper directions on the issue of the identification evidence given by the witnesses Whittaker and Wilson;

(3) The learned trial Judge failed to give a proper direction on alibi.

(1) **ADMISSIBILITY OF EVIDENCE:**

Mr. Furniss submitted that the witness Talbot was a person in authority and that the evidence was obtained by a trick. The

statement, even if admissible, ought not to have been admitted as the prejudicial effect would outweigh the probative value.

At the trial, objection was taken by Counsel as to the admisibility of the statement. In a written decision, the learned trial Judge ruled that the statement would be admitted in evidence.

In the case of Herman King v. Regina [1968] Cr. App. R. 353, Lord Hodson at p. 363 stated :

> "In MURPHY [1965] N.I. 138, Lord MacDermott, C.J., giving the judgment of the Courts-Martial Appeal Court, made valuable observations on circumstances which will or will not render it unfair to allow admissible evidence to be given against an accused person. There the appellant, a soldier serving in the Army, was charged before a district court-martial with the offence of disclosing information useful to an enemy, contrary to section 60(1) of the Army Act 1955. The substance of that case against him was contained in the evidence of police officers, who had posed as members of a subversive organisation with which the authorities suspected the appellant to have sympathies, and had elicited the information the subject of the charge, by asking the appellant questions about the security of his barracks. The appellant was convicted and appealed on the ground that the court-martial ought, in its discretion, to have rejected the evidence. The appellant relied in his argument on the use of the word "trick" which appears in KURUMA'S case (supra) and CALLIS v. GUNN (supra) and in other cases as well. The court reviewed these and other authorities and, commenting on the passage in Lord Parker, C.J. judgment to which their Lordships have already referred, used this language (at p. 147): "We do not read this passage as doing more than listing a variety of classes of oppressive conduct which would justify exclusion. It certainly gives no ground for saying that any evidence obtained by any false representation or trick is to be regarded as oppressive and left out of consideration. Detection by deception is a form of police procedure to be directed and used sparingly and with circumspection but as a method it is as old as the constable in plain clothes and, regrettable though the fact may be, the day has yet come when it would be safe to say that the law and order could always be enforced and the public safety protected without occasional resort to it. We find that conclusions hard to avoid on any survey of the preventative and enforcement functions of the police but it is enough to point to the salient facts of the present appeal. the appellant was beyond all doubt a serious security risk; this was revealed by the trick of misrepresentation practised by the police as already described, and no other way of obtaining this revelation has been demonstrated or suggested. We cannot hold that this was necessarily oppressive or that Lord Parker of Waddington intended to lay down any rule of law which meant that it was the duty of the court-martial, once the trick used the police had been established to reject the evidence that followed from it.
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> Their Lordships agree with the judgment of the Courts Martial Appeal Court in holding that unfairness

> to the accused is not susceptible of close definition. See at p. 149: "it must be judged of in the light of all the material facts and findings and all the surrounding circumstances. The position of the accused, the nature of the investigation, and the gravity or otherwise of the suspected offence may all be relevant. That is not to say that the standard of fairness must bear some sort of inverse proposition to the extent to which the public interest may be involved, but different offences may pose different problems for the police and justify different methods."

In **R. v. Christor, R. v. Wright [1992]** 1 Q.B. 979, the police evidence by a trick using an undercover operation. In giving the judgment of the Court, Chief Justice, Lord Taylor of Gosforth stated at page 989 :

> " Putting it in different words; the trick was not applied to the appellant; they voluntarily applied themselves to the trick. It is not every trick producing evidence against an accused which results in unfairness. There are, in criminal investigations, a number of situations in which the police adopt ruses or tricks in the public interests to obtain evidence. For example, to trap a blackmailer, the victim may be used as an agent of the police to arrange an appointment and false or marked money may be laid as bait to catch the offender. A trick, certainly; in a sense too, a trick which results in a form of self-incrimination; but not one which could reasonably be thought to involve unfairness. Cases such as Reg. v. Payne [1963] 1 W.L.R. 637, and Reg. v. Mason (Carl) [1988] W.L.R 139 are very different from the present case or the blackmail example. In Reg. v. Mason as in Reg. v. Payne [1963] 1 W.L.R. 637, the defendant was in police custody at a police station. Officers lied to both the defendant and his solicitor. Having no evidence against the defendant, they falsely asserted that his fingerprint had been found in an incriminating place in order to elicit admissions from him. After advice from his solicitor, the defendant made submissions. This court quashed his conviction. "

In **Curtis Edward Dearing v. Regina** Criminal Appeal 44 of 1985, an unreported case from Bermuda, the Court of Appeal held that the trial Judge had not erred in the exercise of his discretion in admitting the evidence of Drug Enforcement Officer who posed as a person under arrest. He was placed in a cell with the appellant and their conversation, as in the instance appeal, was sought to be admitted in evidence. The Court of Appeal held at page 25 :

> " I agree with the view expressed by the learned judge that "the introduction of an undercover agent into a remand prisoner's cell in the hope of gaining incriminating information is not the kind of investigative technique which one would like to see generally introduced into Bermuda." Nevertheless, large-scale

> international drug trafficking in this part of the world poses a very serious problem indeed to the law enforcement agencies. It is clear, as the learned judge said, that the police were dealing with an "attempt to uncover clandestine large scale drug importation by an operator who was not personally engaged in the movement of the drugs"; and as Lord MacDermott said, "different offences may pose different problems for the police and justify different methods."
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> Smith was not an agent provocateur in any sense of the term, nor was he a "person in authority". The appellant had no reason to think that Smith was other than a fellow prisoner who had been charged in the United States with some offence involving heroin and who was a fugitive from justice. In that frame of mind, he chatted with Smith freely and voluntarily."

In Rothman v. The Queen [1981] 59 C.C.C. [2nd] 30, the majority of the Court held that evidence which was similarly obtained as in the instant case was correctly admitted in evidence. The Court held that the police officer was not a person in authority and accordingly the special rules governing the admissibility of statements had no application. A subjective test should be applied in the circumstances of the case and thus the officer was not a person in authority as he was not regarded as such by the accused. There was no attempt to compel the accused to make the disclosure as he did.

The majority of the Court also held that even if the officer was a person in authority, there was no basis for excluding the statement. Disapproval of the method used to obtain a confession was not sufficient basis for refusal to receive it in evidence. In determining the admissibility of a statement to a person in authority the Court is not immediately concerned with the truth or reliability of the statement made by the accused but with the question whether the statement made was free and voluntary in the sense that it was not obtained by fear or prejudice or hope of advantage exercised or held out by a person in authority and whether the statement was the utterance of an operating mind. In this case the statement was made freely by the accused and was volunteered by him.

The minority judgment held that confessions are not admissible where to admit them would bring the administration of justice into disrepute or would prejudice the public interest in the integrity of the judicial process.

In the case of **Deokinanan v. The Queen [1969]** 1. A.C. 20, the accused was charged with the offence of murder. On the instructions of the Police, a friend was placed in a cell with the accused who told his friend how he had murdered one of the three men. The Court held that the evidence was admissible.

In the case of **R. v. Bailey and another** [1993] 3 All ER 513, the appeal was concerned with the admissibility in evidence of a number of highly incriminating remarks, tantamount to admissions of guilt, made and tape-recorded during the course of conversations between the appellant whilst they were sharing a bugged cell at a police station after being arrested, charged and remanded into police custody. It was held that it was no unfair to have admitted the taped conversations. This case was distinguished from the case of **R. v. Mason** which will now be considered.

In the case of **R. v. Carl Mason [1988]** 86 CR. APP. R. 349, the appellant was charged with arson. It was alleged that he had set fire to the car of his former girl friend's father with whom he was on bad terms. Before his arrest the police had no evidence connecting him with the cause of the fire. Police officers decided to trick the appellant by telling him untruthfully, that they had found one of his finger-prints on some fragments of a bottle used in starting the fire. It was also confirmed to the appellant's solicitor that the fingerprints had been found.

The Solicitor advised the appellant to answer police questions and explain his involvement in the incident, if any. The appellant then admitted that he had filled the bottle used in the incident, one with petrol and the other with paint thinners. A friend had set the car alight for him. He was not present when it was done. The confession

was admitted in evidence. It was held that the trial judge had wrongly exercised his discretion when he failed to consider the deceit practised on the appellant and his Solicitor, for if he had done so he would have been bound to exclude the confession. As there was no other evidence, the conviction was quashed.

In his judgment, Watkins, L.J. at page 354 stated :

> It is obvious from the undisputed evidence that the police practised a deceit not only upon the appellant, which is bad enough, but also upon the solicitor whose duty it was to advise him. In effect, they hoodwinked both solicitor and client. That was a most reprehensible thing to do. It is not however because we regard as misbehavior of a serious kind conduct of that nature that we have come to the decision soon to be made plain. This is not the place to discipline the police. That has been made clear here on a number of previous occasions. We are concerned with the application of the proper law. The law is, as I have already said, that a trial judge has a discretion to be exercised of course upon right principles to reject admissible evidence in the interests of a defendant having a fair trial. The judge in the present case appreciated that, as the quotation from his ruling shows. So the only question to be answered by this Court is whether, having regard to the way the police behaved, the judge exercised that discretion correctly. In our judgment he did not. He omitted a vital factor from his consideration, namely the deceit practised upon the appellant's solicitor. If he had included that in his consideration of the matter we have not the slightest doubt that he would have been driven to an opposite conclusion, namely that the confession be ruled out and the jury not permitted therefore to hear of it. If that had been done, an acquittal would have followed for there was no other evidence in the possession of the prosecution.

In the case of **Lwee-Yi-choi v. R.** [1986] L.R.C. (Crim) 340, the applicant who was convicted on a charge of murder applied for leave to appeal, one ground being that his confession had been obtained as a result of a trick when he was in custody. A police officer pretended to be a fellow prisoner and whilst in his cell, had discussions with

him about the crime.

The Court of Appeal in Hong Kong held that the admission in evidence of the accused confession, obtained as it was, breached the principles existing in law to secure fair trials. The trial Judge in such circumstances should have exercised his discretion in excluding the evidence. The trial Judge did not think that he had a discretion to exercise. The Court also held that the Police Officer was a person in authority.

It further held that the admission in evidence of the applicant's confession did endanger the principles which exist in law to secure fair trials and that the administration of justice was thereby brought into disrepute.

It does not appear, however, that the Court held that the evidence was not admissible.

In the instant case, the learned trial Judge in ruling that the evidence was admissible stated at page 5 of his ruling :

> "In this case the Police had evidence that Thomas had been involved in a brutal murder and robbery. But they felt the evidence was not a substantial enough to place before the Court. They felt they had exhausted all other methods of obtaining clear-cut evidence against him. The security of a small community had been severely shaken by this incident. The police must have felt that this was an extreme case which warranted extreme measures. From the transcript it is clear that Thomas volunteered the information sought to be tendered. Thomas, from the transcript, was doing most of the talking. In all the circumstances I felt that in this extreme case it would not bring the administration of justice into disrepute to allow the evidence of the conversations between Thomas and Talbot to be admitted. Whilst not wishing to be seen to endorse an investigative practice which is objectionable, I considered that in this case public confidence in the integrity of the judicial process would not be adversely affected by the allowing the evidence to go to the jury."

The learned trial Judge exercised his discretion in ruling the evidence to be admissible.

In our view the evidence was admissible. The appellant did not regard the police officer as a person in authority. He, it was, who stated the conversation and volunteered his involvement in the robbery and killing of the deceased. It cannot be said that the discretion of the learned trial Judge was incorrectly exercised.

2. IDENTIFICATION EVIDENCE

Mr. Furniss submitted that the learned trial Judge failed to adequately direct the jury on the Identification evidence given by the witnesses Whittaker and Wilson. He failed to tell the jury what the consequences would be if the jury did not accept the explanations given by the witnesses as to their failure to point out the appellant Thomas at the Identification Parade.

In directing the jury, the learned trial Judge at page 170 stated:

> " Now we have various witnesses who identified Thomas but I must give you this warning on identification evidence. There is special need for caution, before convicting an accused person in reliance on the correctness of an identification. The reason for this is that it is quite possible for an honest witness to make a mistake and indeed notorious miscarriage of justice have occurred as a result of such a mistake. A mistaken witness can be a convincing one and even a number of apparently convincing witnesses can all be mistaken. You must examine carefully the circumstances in which the identification of each witness was made. How long did he have the person under observation ? At what distance did he get a good look at his face ? Was his view impeded in anyway ? Had he ever seen the person before, and if so, how often ? If only occasionally, did he have any special reason for remembering him. How long elapsed between the original observation and the subsequent identification to police? And in this particular case, we also have the questioned integrity of the identification of two witnesses, who didn't point out the accused Thomas at an identification parade but who subsequently and out of his sight and hearing identified him to the police."

This general direction cannot be faulted. It was submitted, however, that in dealing with the evidence of the two witnesses, the learned trial Judge failed to adequately direct the jury.

Both witnesses deponed that they attended an Identification Parade on which the appellant Thomas was a suspect. Both failed to point out anyone on the Parade. However, both testified that they saw the appellant in the line of men but did not point him out because they were scared. Neither expected that they would be face to face with the men.

The learned trial Judge ought to have told the jury that if they rejected the explanation given by the witnesses as to their failure to identify the appellant, then the identification in Court would amount to a Dock Identification. In the circumstances, the identification in Court would have little weight.

Before us, Counsel for the Crown conceded that the Crown was not relying on the identification evidence.

Mr. Furniss referred the Court to Beckford and Shaw v. R. [1993] 42 W.I.R. 291 where Lord Lowry at page 299 said :

> " One of the authorities on which Mr. Robertson relied was the very important Australian case, Domican v. R. [1992] 66 ALJR 285, which reemphasizes the need for a general warning and the importance of highlighting weaknesses in the identifying witness's evidence. The case is also an authority for the proposition that (at page 289) :
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> > "The trial judge is not absolved from his or her duty to give general and specific warning concerning the danger of convicting on identification evidence because there is other evidence, which, if accepted, is sufficient to convict the accused ..... unless the Court of Criminal Appeal concludes that the jury must inevitably have convicted the accused independently of the identification evidence, the inadequacy or lack of a warning concerning that evidence constitutes a miscarriage of justice even though the other evidence made a strong case against the accused. "

At no time did the learned trial Judge tell the jury that they could convict the appellant on the identification evidence.

If this was the only evidence against the appellant, then clearly the conviction would have to be quashed.

3. **ALIBI**

Mr. Furniss submitted that the learned trial Judge failed to tell the jury that if they rejected the alibi of the appellant, they could not on that account convict him but they should go back to the Crown's case.

The Court was referred to the case of The State v. Ori and Persaud [1975] 22. W.I.R. 201.

In his direction to the jury the learned trial Judge at page 190 said :

> "Thomas's defense is one of alibi which simply means, he says he was somewhere else at the time the robbery took place. As the burden of proof is on the prosecution the accused doesn't have to prove he was elsewhere. On the contrary it is the prosecution to disprove he was elsewhere. Of course, the prosecution have not only sought to prove Thomas was elsewhere by direct evidence of witnesses, and of course you have the evidence of Christian which I shall come to which puts him at the robbery. The prosecution also seeks to persuade you that Thomas's explanation in itself is inherently unlikely, that it offends common sense said Mr. Smellie, for Christian to be with Thomas until 2:30 then for Christian to go off commit a robbery and murder with another person, who some witnesses say is Thomas and others identify him as having some of Thomas's characteristics, and then for Christian to return to Thomas's company within a half of an hour or so of the robbery. Well of course that is a matter for you Madam Foreman, members of the jury, if you conclude that the alibi was false, that does not in itself entitle you to convict Thomas. The prosecution must still establish his guilt."

There is clearly no merit in this submission. The learned trial judge did tell the jury that if they rejected the alibi of the defence, it would not entitle them to convict the appellant but that

the prosecution must still establish his guilt.

Apart from the evidence as to the visual identification, there was a good deal of evidence against Thomas. There was the evidence of Talbot and the tape recording of what transpired in the cell at the police station. There was also the evidence of the co-accused Christian.

This evidence clearly placed the appellant at the Jewellery Shop and his involvement in the killing of the deceased.

There was an abundance of evidence, which if believed, would result in the conviction of the appellant for the offence of murder.

The jury clearly accepted the evidence in returning their verdict of guilty.

For these reasons, the appeal was dismissed and the convictions and sentence affirmed.