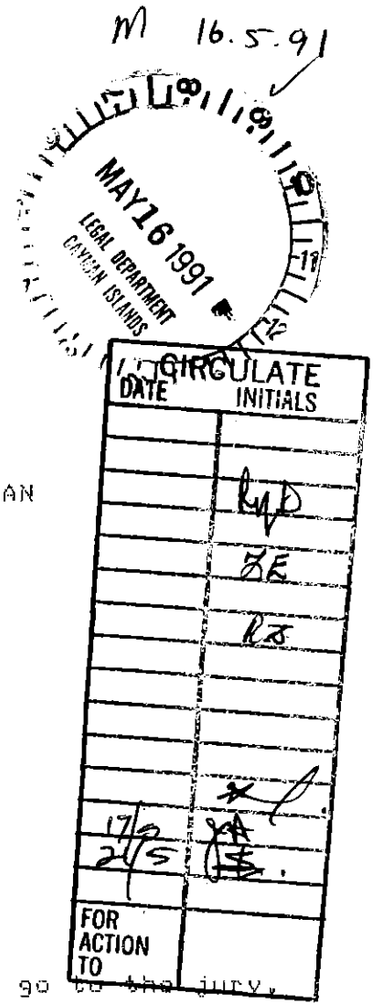
M 16.5.91



IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN.

Criminal

IND# 17/90

REGINA V. McCANDY THOMAS
JERRY M. CHRISTIAN

Mr. Smellie with Mr. Samson for the Crown.
Mr. Harrison with Mr. Levy for Thomas.
Ms. Levers with Mr. Hampson for Christian.

RULING

I have allowed certain evidence to go to the jury, against objections from counsel for the accused Thomas, and I now give my reasons for so doing. The evidence to be elicited is from a Jamaician police officer called Talbot, who, the prosecution alleges, was placed in a police cell with the accused Thomas. Thomas had been in police custody for about a week and had made no inculpatory statement. Talbot pretended that he had been arrested for the importation of drugs and that he was wanted in Jamaica for two murders. In this way he won Thomas' confidence, and Thomas allegedly made statements which amounted to admissions that he was involved in the robbery of the Gold Royale Shop and was present when the victim was murdered. These statements were allegedly tape recorded and, for the purposes of the submissions to me, it was agreed that all I required to see was a transcript of the portion of the conversations between Thomas and Talbot which was sought to be admitted in evidence.

Counsel for Thomas conceded that the evidence from Talbot is admissible. Thomas' statement was made voluntarily and without inducement. However counsel urged me to exclude the evidence because it was obtained by a trick. I have a residual discretion to exclude evidence of confessions or admissions which was obtained by such means, and I was urged to exercise that

discretion in favour of Thomas.

As far as I am aware this is the first time that the police in this jurisdiction have used this type of deception to obtain evidence. The technique used is not the type of investigative practice which finds favour with this Court.

In the case of Curtis Edward Dearing v The Queen (Cr. Appeal 44 of 1985) the Court of Appeal for Bermuda had to determine upon the admission of evidence obtained in similar circumstances such as those confronting me . In that case the judge trial had said, and his statement was endorsed by the Court of Appeal, :-

> ".... the introduction of an undercover agent into a remand prisoner's cell in the hope of gaining incriminating evidence is not the kind of investigative technique which one would like to see generally introduced into Bermuda."

In similar circumstances the Court of Appeal of Hong Kong said in Lwee Yi-Choi v R [1986] LRC (Crim) 340, 346, that :

> ".... the learned judge found the stratagem employed by the police repellent to the ordinary, and revolting to the judicial mind...."

In Rothman v The Queen 59 C.C.C(2d) 30 the Canadian Supreme Court was divided on whether evidence similarly obtained should be admitted. Two members of the Court, including the Chief Justice, were of the view that to allow such evidence to be tendered would bring the administration of justice into disrepute. However, this was not the majority view of the Court.

Policy and principle must play a part in whether or not to allow such evidence to be tendered. It cannot be good policy for the Courts to approve of the use of trickery on the part of investigating authorities so as to infringe accepted principles which are meant to protect a citizens' liberties. The criminal justice system requires the support of the community it serves

and if the investigating authorities conduct themselves in a manner which is repugnant to accepted standards of behaviour, and the Courts are seen to endorse that behaviour, the administration of justice is brought into disrepute. In King (Herman) v R (1968) 52 Cr. App. R 323 the Privy Council had to consider whether evidence obtained in an illegal search should be admitted, and this passage from the judgment of Lord Cooper (Lord Justice General) in Lawrie v Muir, 1950, J.C.19 was approved :

> "From the standpoint of principle it seems to me that the law must strive to reconcile two highly important interests which are liable to come into conflict (a) the interest of the citizen to be protected from illegal or irregular invasions of his liberties by the authorities and (b) the interest of the State to secure that evidence bearing upon the commission of crime and necessary to enable justice to be done shall not be withheld from courts of law on any merely formal or technical ground. Neither of these objects can be insisted upon to the uttermost."

In Lwee Yi-Choi v R (supra) the trial judge had held, mistakenly, that he had no discretion to disallow the evidence of a confession voluntarily tendered to a Hong Kong police officer introduced into a cell with the appellant. The officer posed as a person charged with serious offences. The Court of Appeal of Hong Kong held that the confession was unfairly procured by a trick, and that the admission in evidence of the appellant's confession endangered the principles which exist in law to secure fair trials and that the administration of justice was thereby brought into disrepute. The Court found that the police officer was in fact a person in authority but on my reading of the judgment did not hold that the evidence was thus inadmissible as being procured contrary to the English Judges' Rules of practice. Rather the Court based its decision on the principle that public confidence in the integrity of the judicial process must not be undermined.

The Court of Appeal for Bermuda, in Curtis Edward Dearing v The Queen (supra) held that the trial judge had not

erred in exercising his discretion to admit the evidence of special agent of the United States Drug Enforcement Administration who posed as a person under arrest for charges committed in the United States. He was introduced into a cell with the appellant and their conversations were sought to be admitted in evidence. The Court of Appeal held:

> "(The drug enforcement officer) 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 such officer 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 (the officer) freely and voluntarily."

The admission of the evidence was approved.

So there we have two different approaches to the same problem from two different jurisdictions.

In the case of Rothman v The Queen (supra) the majority of a panel of nine judges of the Canadian Supreme Court held that the evidence of confessions made to a police officer obtained in similar circumstances to those which obtain in this case was admissible and should be admitted. 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 the police officer was not a person in authority as he was not regarded as such by the accused. Disapproval of the method used to obtain a confession in itself is not sufficient basis for refusal to receive it in evidence. However, as I have earlier indicated, the minority view of the Court was that the evidence was obtained in such a manner as to bring the administration of justice into disrepute and that it ought to have been excluded.

Having had the benefit of the guidance of how other

Courts in other jurisdictions have dealt with the same problem I then had to place the problem within our own jurisdiction and in the particular context of this case.

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 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 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 allowing the evidence to go to the jury.

Accordingly I dismissed the defence submissions.

D. Schofield

Dated this